

1-24-2014

State v. Herrera Clerk's Record v. 3 Dckt. 41494

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IN THE
SUPREME COURT
OF THE
STATE OF IDAHO

Vol. 3 of 7

LAW CLERK

S.C. #41494-2014

STATE OF IDAHO
PLAINTIFF/ RESPONDENT

VS.

JOSEPH DUANE HERRERA
DEFENDANT/ APPELLANT

VOLUME I

CLERK'S RECORD OF APPEAL

Appealed from the District Court of the First Judicial District of the State of Idaho, in the
County of Benewah

Lawrence G. Wasden,
Attorney General
Attorney for Respondent

Sara B. Thomas
State Appellate Public Defender
Attorney for the Defendant

FILED - COPY	
MAR 10 2014	
Supreme Court _____	Court of Appeals _____
Entered on ATS by _____	

41494

COPY

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF IDAHO,
IN AND FOR THE COUNTY OF COUNTY OF BENEWAH

STATE OF IDAHO)	
Plaintiff /Respondent)	
VS)	
)	SUPREME COURT CASE # 41494
JOSEPH DUANE HERRERA)	
Defendant /Appellant)	
)	

CLERK'S RECORD OF APPEAL

Appeal from the District Court of the First Judicial District, in and for the County of Benewah

HONORABLE FRED M. GIBLER

State Appellate Public Defender
Attorney for Appellant
3050 N. Lake Harbor Ln. Suite 100
Boise, ID 83703

Lawrence Garth Wasden
Attorney for Respondent
Office of the Attorney General
P.O. BOX 83720
Boise, ID 83720-0010

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11. Request For Jury Instructions-filed March 8 th , 2013	114

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ROA Report

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Case: CR-2011-0002053 Current Judge: Fred M. Gibler

Defendant: Herrera, Joseph Duane

State of Idaho vs. Joseph Duane Herrera

Date	Code	User		Judge
12/27/2011	NCRF	SBRADBURY	New Case Filed - Felony	Patrick R. McFadden
	PROS	SBRADBURY	Prosecutor assigned Douglas P Payne	Patrick R. McFadden
	CRCO	SBRADBURY	Criminal Complaint	Patrick R. McFadden
	ARRN	SBRADBURY	Arraignment / First Appearance	Patrick R. McFadden
	PCAF	SBRADBURY	Court Minutes for Probable Cause Hearing	Patrick R. McFadden
			Document sealed	
	COMM	SBRADBURY	Commitment - Held To Answer \$200.000.00	Patrick R. McFadden
	HRSC	SBRADBURY	Hearing Scheduled (Preliminary 01/09/2012 01:30 PM) 2nd Murder	Patrick R. McFadden
		SBRADBURY	Notice Of Hearing	Patrick R. McFadden
	CMIN	CAROL	Court Minutes	Patrick R. McFadden
1/4/2012	SUBI	SBRADBURY	Subpoena Issued Officer Bob Loe, Chief Margaret Lehmacher, Dr Clyde Hason, S.A. Paul Berger ISP, Derek Barden, Deputy Michael Richardson, Raymond Roy, Katlyn Comack, Suzie Comack, Eunice McEwen, Ron Hodge	Patrick R. McFadden
1/5/2012	SUBR	SBRADBURY	Subpoena Returned Kaytlin Comack, Derek Barden, Raymond Roy, Susan Comack Clyde Hanson, Margaret Lehmbecker, Ron Hodge, Robert Loe	Patrick R. McFadden
1/6/2012	ORPD	SBRADBURY	Defendant: Herrera, Joseph Duane Order Appointing Public Defender Public defender William Butler	Patrick R. McFadden
		SBRADBURY	Order Appointing Public Defender	Patrick R. McFadden
	CMIN	CAROL	Court Minutes	Patrick R. McFadden
1/9/2012	CMIN	SBRADBURY	Court Minutes Hearing type: Preliminary Hearing date: 1/9/2012 Time: 9:09 am Courtroom: District Courtroom Court reporter: Minutes Clerk: Stacy Bradbury Tape Number: Defense Attorney: William Butler Prosecutor: Douglas Payne	Patrick R. McFadden
	CONT	SBRADBURY	Continued (Preliminary 01/23/2012 01:30 PM) 2nd Murder	Patrick R. McFadden
		SBRADBURY	Notice Of Hearing	Patrick R. McFadden
1/10/2012	FABC	SBRADBURY	First Supplemental Response to Discovery	Patrick R. McFadden
1/11/2012	MOTN	SBRADBURY	Motion For Bond Reduction or Release on Own Recognizance and Notice of Hearing	Patrick R. McFadden
	HRSC	SBRADBURY	Hearing Scheduled (Motion 01/23/2012 01:30 PM) Motion for Bond Reduction	Patrick R. McFadden

Time: 11:07 AM

ROA Report

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Case: CR-2011-0002053 Current Judge: Fred M. Gibler

Defendant: Herrera, Joseph Duane

State of Idaho vs. Joseph Duane Herrera

Date	Code	User	Judge
1/12/2012	SUBI	SBRADBURY	Subpoena Issued Subpoena Issued Officer Bob Loe, Chief Margaret Lehmbecker, Dr Clyde Hason, S.A. Paul Berger ISP, Derek Barden, Deputy Michael Richardson, Raymond Roy, Katlyn Comack, Suzie Comack, Eunice McEwen, Ron Hodge
	NOTC	SBRADBURY	Notice of intent to Use 404 (b) Evidence
	SUBR	SBRADBURY	Subpoena Returned Chief Margaret Lehmbecker, Michael Richardson, Clyde Hanson, Ron Hodge, Robert Loe+-
1/17/2012	MOTN	SBRADBURY	Motion to Continue Preliminary Hearing
	SUBR	SBRADBURY	Subpoena Returned Raymond Roy Susan Comack, Kaytlin Comack
1/18/2012	ORDR	SBRADBURY	Order to Continue Preliminary Hearing
	CONT	SBRADBURY	Continued (Preliminary 03/26/2012 01:30 PM) 2nd Murder
		SBRADBURY	Notice Of Hearing
1/23/2012	SUBR	SBRADBURY	Subpoena Returned Michael Richardson, Derek Barden
1/25/2012	HRVC	SBRADBURY	Hearing result for Motion scheduled on 01/23/2012 01:30 PM: Hearing Vacated Motion for Bond Reduction
2/28/2012		SBRADBURY	Miscellaneous Payment: For Making Copy Of Any File Or Record By The Clerk, Per Page Paid by: Carissa Receipt number: 0000531 Dated: 2/28/2012 Amount: \$8.00 (Credit card)
		SBRADBURY	Miscellaneous Payment: Technology Cost - CC Paid by: Carissa Receipt number: 0000531 Dated: 2/28/2012 Amount: \$3.00 (Credit card)
3/13/2012	SUBI	SBRADBURY	Subpoena Issued Officer BOB Loe, Ronnie Dickerson, Jerrilyn Herrera, Jesse Herrera, Cheif Margaret Lehmbecker, Dr Clyde Hansen, Ron Hodge, Officer Scott Castles
3/15/2012	SUBR	SBRADBURY	Subpoena Returned Officer BOB Loe, Ronnie Dickerson, Jerrilyn Herrera, Jesse Herrera, Chief Margaret Lehmbecker, Dr Clyde Hansen, Ron Hodge, Officer Scott Castles
3/21/2012	EXMN	SBRADBURY	Ex-parte Motion for Investigators

Time: 11:07 AM

ROA Report

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Case: CR-2011-0002053 Current Judge: Fred M. Gibler

Defendant: Herrera, Joseph Duane

State of Idaho vs. Joseph Duane Herrera

Date	Code	User	Judge
3/26/2012	CMIN	SBRADBURY	Court Minutes Hearing type: Preliminary Hearing date: 3/26/2012 Time: 9:35 am Courtroom: District Courtroom Court reporter: Minutes Clerk: Stacy Bradbury Tape Number: Defense Attorney: William Butler Prosecutor: Douglas Payne
	PHHD	SBRADBURY	Hearing result for Preliminary scheduled on 03/26/2012 01:30 PM: Preliminary Hearing Held 2nd Murder
	ORDC	SBRADBURY	Order Holding Defendant To Answer To District Court
	HRHD	CAROL	Hearing result for Preliminary scheduled on 03/26/2012 01:30 PM: Hearing Held 2nd Murder
3/27/2012	INFO	CAROL	Prosecuting Attorney's Information
	NTHR	CAROL	Notice Of Hearing of Arraignment
	HRSC	CAROL	Hearing Scheduled (Arraignment 04/13/2012 09:30 AM) Murder in 2nd Degree
3/30/2012	ORDR	CAROL	Order (Bond Reduction to \$100,000.00)
4/9/2012	HRSC	CAROL	Hearing Scheduled (Motion 04/13/2012 09:30 AM) Motion for Investigators (Butler)
	MOTN	CAROL	Ex-Parte Motion for Investigators and Funds and Notice of Hearing
4/13/2012	REQT	CAROL	Request for Cameras in the Courtroom (Mary Orr)
	ORDR	CAROL	Court Authorization
	REQT	CAROL	Request for Cameras in the Courtroom (Dylan Wohlenhaus)
	ORDR	CAROL	Court Authorization
	HRHD	CAROL	Hearing result for Arraignment scheduled on 04/13/2012 09:30 AM: Hearing Held Murder in 2nd Degree
	HRVC	CAROL	Hearing result for Motion scheduled on 04/13/2012 09:30 AM: Hearing Vacated Motion for Investigators and Funds (Butler)
	ORDR	CAROL	Order Entering Plea of Not Guilty
	PLEA	CAROL	A Plea is entered for charge: - NG (118-4001-II Murder II)
	CMIN	CAROL	Court Minutes
4/19/2012	ORDR	CAROL	Order for Investigators (to be filed under seal) Document sealed

State of Idaho vs. Joseph Duane Herrera

Date	Code	User	Judge
4/23/2012	HRSC	CAROL	Hearing Scheduled (Jury Trial 08/14/2012 09:30 AM)
	MOTN	CAROL	Motion for Transcript of Preliminary Hearing
		CAROL	Notice Of Trial
5/1/2012	ORDR	CAROL	Order
5/3/2012	EXMN	CAROL	Ex-parte Motion for Transcript
5/4/2012	ORDR	CAROL	Order RE: Ex-parte Motion for Transcript
5/9/2012		CAROL	Miscellaneous Payment: For Making Copy Of Any File Or Record By The Clerk, Per Page Paid by: James Thomson Receipt number: 0001285 Dated: 5/9/2012 Amount: \$2.00 (Credit card)
		CAROL	Miscellaneous Payment: Technology Cost - CC Paid by: James Thomson Receipt number: 0001285 Dated: 5/9/2012 Amount: \$3.00 (Credit card)
5/18/2012	TRAN	CAROL	Transcript Filed-Transcript of Preliminary Hearing - copies to PA, Butler
	STIP	CAROL	Stipulation for Extension of Time to File Discovery Response and Pretrial Motions
	ORDR	CAROL	Order for Extension of Time to File Discovery Response and Pretrial Motions
5/21/2012		CAROL	Miscellaneous Payment: For Making Copy Of Any File Or Record By The Clerk, Per Page Paid by: Law Office of Staci L. Anderson, PLLC Receipt number: 0001397 Dated: 5/21/2012 Amount: \$123.00 (Check)
	VOIR	CAROL	Voided Receipt (Receipt# 1397 dated 5/21/2012)
5/23/2012		CAROL	Miscellaneous Payment: For Making Copy Of Any File Or Record By The Clerk, Per Page Paid by: Saetrum Law Offices Receipt number: 0001419 Dated: 5/23/2012 Amount: \$67.00 (Check)
		CAROL	Miscellaneous Payment: Registered Mail Fee Paid by: Saetrum Law Offices Receipt number: 0001419 Dated: 5/23/2012 Amount: \$3.00 (Check)
5/13/2012	RSDS	CAROL	Second Supplemental Response To Request For Discovery
	WITN	CAROL	Witness and Exhibit List
	MOTN	CAROL	Motion in Limine
	NOTC	CAROL	Notice of Intent to Use I.R.E. 803(24) and 804(6) Evidence
	NOTC	CAROL	Second Notice of Intent to Use 404(b) Evidence
	MOTN	CAROL	State's Second Motion in Limine

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Case: CR-2011-0002053 Current Judge: Fred M. Gibler

Defendant: Herrera, Joseph Duane

State of Idaho vs. Joseph Duane Herrera

Date	Code	User	Judge
6/14/2012	EXMN	CAROL	Ex-parte Motion for Investigator Funds and Notice of Hearing Fred M. Gibler
	HRSC	CAROL	Hearing Scheduled (Motion 06/15/2012 09:30 AM) Ex-Parte Motion for Investigator Funds Fred M. Gibler
6/15/2012	MOTN	CAROL	Motion to Change Venue Fred M. Gibler
	MOTN	CAROL	Motion to Suppress or Dismiss Fred M. Gibler
6/18/2012	SHFR	CAROL	Registered Agent Return of Service - Subpoena Duces Tecum - Benewah Community Hospital Fred M. Gibler
6/19/2012	NTHR	CAROL	Notice Of Hearing Fred M. Gibler
6/20/2012	HRVC	CAROL	Hearing result for Motion scheduled on 06/15/2012 09:30 AM: Hearing Vacated Ex-Parte Motion for Investigator Funds Fred M. Gibler
	HRSC	CAROL	Hearing Scheduled (Motion in Limine 07/13/2012 01:00 PM) State's Motion and 2nd Motion in Limine Fred M. Gibler
	ORDR	CAROL	Order for Investigator Funds Fred M. Gibler
			Document sealed
	RQDS	CAROL	Defendant's Supplemental Request For Discovery Fred M. Gibler
6/22/2012	NTHR	CAROL	Amended Notice Of Hearing Fred M. Gibler
6/27/2012	RESP	CAROL	Response To Defendant's Supplemental Request For Discovery Fred M. Gibler
6/28/2012	NOTC	CAROL	Notice of Election to Proceed Under Idaho Code 9-420 Fred M. Gibler
	CERT	CAROL	Certification of Records as "Not Found" Fred M. Gibler
	NOTC	CAROL	State's Amendment to Notices of Intent to Use 404(b) and Hearsay Evidence Fred M. Gibler
	MOTN	CAROL	State's Motion for Determination of Admissability of Evidence Fred M. Gibler
	BREF	CAROL	Plaintiff's Brief in Support of Admission of Victim's Statement and 404(b) Evidence Fred M. Gibler
	SUBI	CAROL	Subpoena Issued - James Comack, Suzie Comack, Jack Comack, Katlyn Comack, Eunice McEwen, Kianna Appell, Kim Smith, Bobbie Riddle, Tiffany Reeves, Roger Hossfeld, Eunice McEwen Fred M. Gibler
6/29/2012	WITN	CAROL	First Amendment to State's Witness List Fred M. Gibler
7/2/2012	SUBR	CAROL	Subpoena Returned - Kimberly Anna Smith, Tiffany Ann Reeves, Kiani Rayelle Appell, Bobbie Joe Riddle, James Eric Comack, Jennifer Lynn Yumi Hickson Fred M. Gibler
7/5/2012	SUBR	CAROL	Subpoena Returned - Rodger Harold Hossfeld, Jr. Fred M. Gibler
7/6/2012	NTHR	CAROL	Notice Of Hearing Fred M. Gibler
7/9/2012	SUBR	CAROL	Subpoena Returned - Eunice Marie McEwen Fred M. Gibler

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Case: CR-2011-0002053 Current Judge: Fred M. Gibler

Defendant: Herrera, Joseph Duane

State of Idaho vs. Joseph Duane Herrera

Date	Code	User	Judge
7/10/2012	SUBI	CAROL	Subpoena Issued - Officer Scott Castles, Chief Margaret Lehmbecker, Det. Paul Berger
	SUBR	CAROL	Subpoena Returned - Scott Charles Castles, Jr., Margaret Ann Lehmbecker
7/13/2012	HRHD	CAROL	Hearing result for Motion in Limine scheduled on 07/13/2012 01:00 PM: Hearing Held State's Motion and 2nd Motion in Limine Defense Motion to Change Venue and Motions to Suppress
	MISC	CAROL	New folder No. 2 Action Agency Billing - \$2500.00 Document sealed
	REQT	CAROL	Request for Cameras in the Courtroom and
	MISC	CAROL	Court Authorization
	CMIN	CAROL	Court Minutes
7/16/2012	SUBR	CAROL	Subpoena Returned - Caytlin Comack
7/20/2012	ORDR	CAROL	Order Denying Defendant's Motion to Suppress or Dismiss
7/24/2012	SUBI	CAROL	Subpoena Issued - Ron Hodge, Det. Paul Berger, Det. Michael Van Leuven, Det. Charles Greear, Officer Robert W. Loe, Chief Margaret Lehmbecker, Jesse Herrera, Jerilyn Herrera, Dr. Clyde Hansen, Derek Bsarden, Raymond Roy, James Comack, Suzie Comack, Katlyn Comack, Danny Ducommun, Jana Hanson, Vincent Hanson, Stuart Jacobsen, Officer Scott Castles, Ronnie Dickerson, Trp. Glenn Bakken, Dr. Sally Aiken, Deputy Michael Richardson, Deputy Robert Rogers, Deputy Rodney B. Dickenson, Bobbie Riddle, Janelle Buell, Dr. Paul F. Paschall
	ORDR	CAROL	Order on State's Motion for Determination of Admissability of Evidence
	MOTN	CAROL	Supplement to Motion to Change Venue
7/26/2012	SUBR	CAROL	Subpoena Returned - Margaret Ann Lehmbecker, Rodney Bryan Dickenson, Derek Barden
	HRSC	CAROL	Hearing Scheduled (Motion 08/01/2012 02:00 PM) Defense Motion to Continue Jury Trial
	MOTN	CAROL	Motion to Continue Jury Trial
	ORDY	CAROL	Order Denying Motion to Change Venue
7/27/2012	SUBR	CAROL	Subpoena Returned - Jerilynn Ronda Herrera, Susan Comack, Dan Ducommen, Vincent Hanson, Jana Hanson, Zachary Paul Sifford, Robert E. Rogers, Scott C. Castles, Raymond Roy, Robert W. Loe, Sr., Clyde Hansen, Bobbie Joe Riddle, Michael J. Richardson, Ronald Lee Hodge, Janelle Marie Buell

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ROA Report

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Case: CR-2011-0002053 Current Judge: Fred M. Gibler

Defendant: Herrera, Joseph Duane

State of Idaho vs. Joseph Duane Herrera

Date	Code	User		Judge
7/27/2012	NTHR	CAROL	Notice Of Hearing	Fred M. Gibler
7/29/2012	SUBR	CAROL	Subpoena Returned - Susan Comack	Fred M. Gibler
7/30/2012	SUBR	CAROL	Subpoena Returned - Ronald Dickerson, Jesse Herrera	Fred M. Gibler
7/31/2012	SUBR	CAROL	Subpoena Returned - Jack Henry Comack, James Eric Comack, Kaytlin Comack	Fred M. Gibler
8/1/2012	HRHD	CAROL	Hearing result for Motion scheduled on 08/01/2012 02:00 PM: Hearing Held Defense Motion to Continue Jury Trial	Fred M. Gibler
	GRNT	CAROL	Motion Granted	Fred M. Gibler
	CONT	CAROL	Hearing result for Jury Trial scheduled on 08/14/2012 09:30 AM: Continued 2nd Degree Murder	Fred M. Gibler
	REQT	CAROL	Request for Cameras in the Courtroom and Court Authorization Granted	Fred M. Gibler
	CMIN	CAROL	Court Minutes	Fred M. Gibler
8/2/2012	ORDR	CAROL	Order Continuing Jury Trial	Fred M. Gibler
8/3/2012	HRSC	CAROL	Hearing Scheduled (Jury Trial 12/11/2012 09:30 AM) 2nd Degree Murder	Fred M. Gibler
		CAROL	Notice Of Trial	Fred M. Gibler
8/6/2012		CAROL	Miscellaneous Payment: For Making Copy Of Any File Or Record By The Clerk, Per Page Paid by: James Thomson Receipt number: 0002173 Dated: 8/6/2012 Amount: \$9.00 (Credit card)	Fred M. Gibler
		CAROL	Miscellaneous Payment: Technology Cost - CC Paid by: James Thomson Receipt number: 0002173 Dated: 8/6/2012 Amount: \$3.00 (Credit card)	Fred M. Gibler
9/25/2012	NOTC	CAROL	Notice of Substitution of Counsel	Fred M. Gibler
	APER	CAROL	Defendant: Herrera, Joseph Duane Appearance James E Siebe	Fred M. Gibler
9/26/2012	RQDS	CAROL	Request For Discovery	Fred M. Gibler
11/20/2012	MOTN	CAROL	Motion to Continue	Fred M. Gibler
11/21/2012	ORDR	CAROL	Order to Continue	Fred M. Gibler
	CONT	CAROL	Continued (Jury Trial 03/12/2013 09:00 AM) 2nd Degree Murder	Fred M. Gibler
12/28/2012	RDRD	CAROL	Request For Discovery and Alibi Demand	Fred M. Gibler
2/1/2013	HRSC	CAROL	Hearing Scheduled (Status 02/22/2013 09:30 AM)	Fred M. Gibler
		CAROL	Notice Of Hearing	Fred M. Gibler
2/22/2013	HRHD	CAROL	Hearing result for Status scheduled on 02/22/2013 09:30 AM: Hearing Held	Fred M. Gibler
	CMIN	CAROL	Court Minutes	Fred M. Gibler

State of Idaho vs. Joseph Duane Herrera

Date	Code	User	Judge
2/25/2013	SUBI	CAROL	Subpoena Issued - Det. Michael Van Leuven, Officer Robert W. Loe, Chief Margaret Lehmbecker, Jesse Herrera, Jerilyn Herrera, Dr. Clyde Hansen, Derek Barden, Raymond Roy, James Comack, Susie Comack, Katlyn Comack, Eunice McEwen, Jana Hanson, Vincsent Hanson, Det. Paul Berger, Stuart Jacobsen, Deputy Scott Castles, Ronnie Dickerson, Trp. Glenn Bakken, Det. Charles Greear, Sally Aiken, Deputy Michael Richardson, Robby Rogers, Deputy Rodney B. Dickenson, Bobbie Riddle, Janelle Buell, Dr. Paul F. Paschall
2/26/2013	SUBR	CAROL	Subpoena Returned - Dr. Clyde Hansen
2/27/2013	SUBR	CAROL	Subpoena Returned - Susan Ann Comack, Ronald Lee Dickerson, Bobbie Joe Riddle, Jana Lee Hanson, Jana Lee Hanson, Vincent Leon Hanson, Raymond Albert Roy, Rodney Bryan Dickenson, Kaytlin Jacklin Marie Comack, Derek Daniel Barden, Margaret Ann Lehmbecker
2/28/2013	SUBR	CAROL	Subpoena Returned - Michael John Richardson, Scott Charles Castles, Jr., Jerilynn Ronda Herrera, Jesse Warren Herrera, Janelle Marie Buell, James Eric Comack, Robert Earl Rogers
3/1/2013	SUBR	CAROL	Subpoena Returned - Robert William Loe, Sr.
	WITN	CAROL	State's Second Amended Witness and Exhibit List
3/4/2013	MISC	CAROL	Personal/Recalled Return of Service - Eunice McEwen
3/5/2013	JUID	CAROL	Proposed Jury Instructions/defendant
3/8/2013	REQT	CAROL	Request for Cameras in the Courtroom - Gazette Record
	REQT	CAROL	Request for Cameras in the Courtroom - KHQ News
	REQT	CAROL	Request for Jury Instructions
	REQT	CAROL	Request for Cameras in the Courtroom
	REQT	CAROL	Request for Cameras in the Courtroom
3/11/2013	MISC	CAROL	Court Authorization
3/12/2013	JTST	CAROL	Hearing result for Jury Trial scheduled on 03/12/2013 09:00 AM: Jury Trial Started 2nd Degree Murder March 12-15 and 19-20, 2013
	HRVC	CAROL	Hearing result for Jury Trial scheduled on 03/12/2013 09:00 AM: Hearing Vacated 2nd Degree Murder March 12-15 and 19-20, 2013
	CMIN	CAROL	Court Minutes

Time: 11:07 AM

ROA Report

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Case: CR-2011-0002053 Current Judge: Fred M. Gibler

Defendant: Herrera, Joseph Duane

State of Idaho vs. Joseph Duane Herrera

Date	Code	User	Judge
3/13/2013	HRSC	CAROL	Hearing Scheduled (Status 03/22/2013 09:30 AM)
		CAROL	Notice Of Hearing
	MISC	CAROL	Court Authorization
3/18/2013	MOTN	CAROL	Motion in Limine
3/19/2013	MOTN	CAROL	Motion to Disable Firearm
	ORDR	CAROL	Order Approving Disabling of Firearm
3/22/2013	HRHD	CAROL	Hearing result for Status scheduled on 03/22/2013 09:30 AM: Hearing Held
	CMIN	CAROL	Court Minutes
3/25/2013	HRSC	CAROL	Hearing Scheduled (Jury Trial 06/11/2013 09:30 AM) Trial dates June 11-14, 18-19 in Kootenai County 2nd Degree Murder
		CAROL	Notice Of Trial
4/3/2013	SUBI	SBRADBURY	Subpoena Issued - Det. Michael Van Leuven, Officer Robert W. Loe, Chief Margaret Lehmbecker, Jesse Herrera, Jerilyn Herrera, Dr. Clyde Hansen, Derek Barden, Raymond Roy, James Comack, Susie Comack, Katlyn Comack, Eunice McEwen, Jana Hanson, Vincsent Hanson, Det. Paul Berger, Stuart Jacobsen, Deputy Scott Castles, Ronnie Dickerson, Trp. Glenn Bakken, Det. Charles Greear, Sally Aiken, Deputy Michael Richardson, Robby Rogers, Deputy Rodney B. Dickenson, Bobbie Riddle, Janelle Buell, Dr. Paul F. Paschall
4/4/2013	ORDR	CAROL	Order Setting Trial
4/8/2013	SUBR	CAROL	Subpoena Returned - Raymond Albert Roy, Jesse Warren Herrera, Robert William Loe, Sr., Susan Ann Comack, Margaret Ann Lehmbecker, James Eric Comack, Rodney Bryan Dickenson, Michael John Richardson, Scott Charles Castles, Jr., Bobbie Joe Riddle, Dr. Clyde Hansen, Jerilynn Ronda Herrera, Ronald LOee Dickerson, Kaytlin Jacklin Marie Comack, Janelle Marie Buell
4/11/2013	SUBR	CAROL	Subpoena Returned - Derek Daniel Barden
4/5/2013	NOTC	CAROL	Notice of Additional Witness
	SUBI	CAROL	Five Blank Subpoenas Issued
4/11/2013	CMIN	CAROL	Court Minutes
	CMIN	CAROL	Court Minutes
	INFO	CAROL	Amended Prosecuting Attorney's Information

State of Idaho vs. Joseph Duane Herrera

Date	Code	User	Judge
6/11/2013	HRHD	CAROL	Hearing result for Jury Trial scheduled on 06/11/2013 09:30 AM: Hearing Held Trial dates June 11-14, 18-19 2nd Degree Murder Fred M. Gibler
	JTST	CAROL	Hearing result for Jury Trial scheduled on 06/11/2013 09:30 AM: Jury Trial Started Trial dates June 11-14, 18-19 2nd Degree Murder Fred M. Gibler
6/12/2013	CMIN	CAROL	Court Minutes Fred M. Gibler
6/13/2013	CMIN	CAROL	Court Minutes Fred M. Gibler
6/14/2013	SUBI	SBRADBURY	3 blank Subpoenas Issued Fred M. Gibler
6/18/2013	CMIN	CAROL	Court Minutes Fred M. Gibler
6/19/2013	CMIN	CAROL	Court Minutes Fred M. Gibler
	JUID	CAROL	Jury Instructions/defendant Fred M. Gibler
	JRYI	CAROL	Jury Instructions Fred M. Gibler
	VERD	CAROL	Verdict Fred M. Gibler
	PSIO1	CAROL	Pre-Sentence Investigation Evaluation Ordered Fred M. Gibler
6/21/2013	ORDR	CAROL	Order Entering Jury Verdict of Guilty and for Presentence Investigation Fred M. Gibler
	FOGT	CAROL	Found Guilty After Trial (I18-4001-II Murder II) Fred M. Gibler
	CAGP	CAROL	Court Accepts Guilty Plea (I18-4001-II Murder II) Fred M. Gibler
	STAT	CAROL	STATUS CHANGED: closed pending clerk action Fred M. Gibler
6/25/2013	HRSC	CAROL	Hearing Scheduled (Sentencing 08/29/2013 03:00 PM) 2nd Degree Murder Fred M. Gibler
		CAROL	Notice Of Hearing Fred M. Gibler
8/23/2013	PRES	CAROL	Presentence Report Fred M. Gibler
			Document sealed
8/28/2013	ORDR	CAROL	Order in RE: Dress Clothes Fred M. Gibler
8/29/2013	HRHD	CAROL	Hearing result for Sentencing scheduled on 08/29/2013 03:00 PM: Hearing Held 2nd Degree Murder Fred M. Gibler
	JDMT	CAROL	Judgment and Sentence Fred M. Gibler
	SNIC	CAROL	Sentenced To Incarceration (I18-4001-II Murder II) Confinement terms: Credited time: 640 days. Penitentiary determinate: 22 years. Fred M. Gibler
	OTST	CAROL	Other Sentencing Information: Indeterminate Life sentence. Fred M. Gibler
	CMIN	CAROL	Court Minutes Fred M. Gibler
9/9/2013	SNPF	CAROL	Sentenced To Pay Fine 240.50 charge: I18-4001-II Murder II Fred M. Gibler
9/18/2013	ORDR	CAROL	Order for Appointment of Idaho State Appellate Public Defender for Purposes of Appeal Fred M. Gibler

Time: 11:07 AM

ROA Report

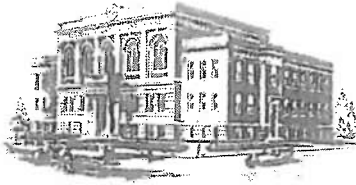
Page 11 of 11

Case: CR-2011-0002053 Current Judge: Fred M. Gibler

Defendant: Herrera, Joseph Duane

State of Idaho vs. Joseph Duane Herrera

Date	Code	User		Judge
10/1/2013	NOTA	CAROL	Notice Of Appeal	Fred M. Gibler
	APSC	CAROL	Appealed To The Supreme Court	Fred M. Gibler
	STAT	CAROL	STATUS CHANGED: Inactive	Fred M. Gibler
12/13/2013	NLT	CAROL	Notice Of Lodging Transcript On Appeal - Byrl Cinnamon	Fred M. Gibler
	NLT	CAROL	Notice Of Lodging Transcript On Appeal - Anita Self	Fred M. Gibler
	NLT	CAROL	Notice Of Lodging Transcript On Appeal - Valerie Nunemacher	Fred M. Gibler
1/24/2014	NOTC	SBRADBURY	Notice Of Telephonic Hearing	Fred M. Gibler
	HRSC	SBRADBURY	Hearing Scheduled (Hearing Scheduled 02/14/2014 12:00 PM) Telephonic Hearing	Fred M. Gibler
	RESP	SBRADBURY	Response To "Objection to the Record" and Motion to Vacate Hearing	Fred M. Gibler
1/28/2014	AMAF	SBRADBURY	Amended Notice of Telephonic Hearing	Fred M. Gibler
1/30/2014	HRHD	SBRADBURY	Hearing result for Hearing Scheduled scheduled on 02/14/2014 12:00 PM: Hearing Held Telephonic Hearing	Fred M. Gibler
	OBJE	SBRADBURY	Objection to the Record	Fred M. Gibler
	ORDR	SBRADBURY	Order Granting Objection to the Record	Fred M. Gibler
2/28/2014	NOTC	SBRADBURY	Notice of Transcript lodged	Fred M. Gibler



Julie K. Foland
Official Court Reporter - ID CSR No. 639
324 West Garden Avenue • P.O. Box 9000
Coeur d'Alene, Idaho 83816-9000
Phone: (208) 446-1130
Email: jfoland@kcgov.us

TO: Clerk of the Court
Idaho Supreme Court
451 West State Street
Boise, Idaho 83720

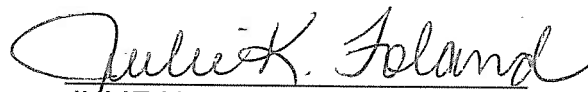
Filed
Benewah County
2/28, 2014 at 10:15 AM
By [Signature] Deputy

DOCKET NO. 41494

(STATE OF IDAHO
(
(vs.
(
(JOSEPH DUANE HERRERA

NOTICE OF TRANSCRIPT LODGED

Notice is hereby given that on February 26, 2014, I lodged a transcript of 158 pages in length, including the July 13, 2012, Motions Hearing, for the above-referenced appeal with the District Court Clerk of the County of Benewah in the First Judicial District.


JULIE K. FOLAND
February 26, 2014

JAN. 30. 2014 10:36AM
TO: BENEWAH

FRED GIBLER

RECEIVED

FEB - 3 2014

SUPREME COURT
COURT OF APPEALS

NO. 466

P. 1

RECEIVED

FEB 10 2014

BENEWAH COUNTY

FILED
BENEWAH COUNTY

2014 JAN 30 PM 12:46

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT
OF THE STATE OF IDAHO IN AND FOR THE COUNTY OF BENEWAH

STATE OF IDAHO,
Plaintiff-Respondent,

v.

JOSEPH DUANE HERRERA,
Defendant-Appellant.

CASE NO. CR 2011-2053
SUPREME COURT NO. 41494

ORDER GRANTING
OBJECTION TO THE RECORD

Upon reviewing the attached (stipulation or objection) and finding good cause, IT
IS HEREBY ORDERED the Record on Appeal in the above mentioned case shall
include the following:

- 1) Transcript of the motions hearing, held on 7/13/12, Court Reporter: Julie
Farland, estimated pages: none provided;
- 2) Defense's Proposed Jury Instructions, filed on 3/5/13;
- 3) Request for Jury Instructions, filed on 3/8/13; and
- 4) Jury Instructions provided to the jury at trial, held from 6/11/13 to 6/19/13.

The above items shall be prepared and lodged with the Clerk of the Idaho
Supreme Court, and copies served on the State Appellate Public Defender's Office and
the Idaho Attorney General's Office. The above items shall be prepared at county
expense.

DATED this 30 day January, 2014.

Fred M. Gibler
FRED GIBLER
District Judge

ORDER GRANTING OBJECTION TO THE RECORD - Page 1

FILED - ORIGINAL
FEB - 3 2014
Supreme Court Court of Appeals
Entered on ATS by

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 30 day of Jan, 2014, served a true and correct copy of the attached ORDER by placing a copy in the United States mail, postage prepaid, addressed to:

DOUGLAS PAYNE
ATTORNEY AT LAW
701 COLLEGE STREET
ST MARIES ID 83861

JAMES E SIEBE
ATTORNEY AT LAW
608 NORTHWEST BLVD. STE 101
COEUR D' ALENE ID 83814

JULIE FARLAND
COURT REPORTER
401 EAST FRONT AVENUE
COEUR D' ALENE ID 83814

KENNETH K. JORGENSEN
DEPUTY ATTORNEY GENERAL
CRIMINAL DIVISION
PO BOX 83720
BOISE ID 83720-0010

SARA B THOMAS
STATE APPELLATE PUBLIC DEFENDER
3050 N LAKE HARBOR LANE SUITE 100
BOISE ID 83703

STEPHEN KENYON
CLERK OF THE SUPREME COURT
PO BOX 83720
BOISE ID 83720-0101



Clerk of the Court

ORDER - Page 2

SARA B. THOMAS
State Appellate Public Defender
I.S.B. #5867

ERIK R. LEHTINEN
Chief, Appellate Unit
I.S.B. #6247



SPENCER J. HAHN
Deputy State Appellate Public Defender
I.S.B. #8576
3050 N. Lake Harbor Lane, Suite 100
Boise, ID 83703
(208) 334-2712
(208) 334-2985 (fax)

CONFIRM
BENEWAH COUNTY

2014 JAN 30 AM 11:09

BY: SJK DEPUTY

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO IN AND FOR THE COUNTY OF BENEWAH

STATE OF IDAHO,

Plaintiff-Respondent,

v.

JOSEPH DUANE HERRERA,

Defendant-Appellant.

CASE NO. CR 2011-2053
SUPREME COURT NO. 41494

OBJECTION TO THE RECORD

TO: THE ABOVE-NAMED RESPONDENT, THE STATE OF IDAHO, AND DOUGLAS PAYNE, COURTHOUSE, 701 COLLEGE STREET, ST. MARIES, ID 83861, AND THE CLERK OF THE ABOVE ENTITLED COURT:

NOTICE IS HEREBY GIVEN that appellant in the above entitled proceeding hereby objects to the record on appeal served on , 2013, pursuant to Idaho Appellate Rule (I.A.R.) 29. This objection is based upon the fact that the appellant is requesting the items listed below. Accordingly, the appellant requests, pursuant to I.A.R. 29(a), that the following transcript and documents be added:

- 1) Transcript of the motions hearing, held on 7/13/12, Court Reporter: Julie Farland, estimated pages: none provided;

- 2) Defense's Proposed Jury Instructions, filed on 3/5/13;
- 3) Request for Jury Instructions, filed on 3/8/13; and
- 4) Jury Instructions provided to the jury at trial, held from 6/11/13 to 6/19/13.

Idaho case law currently indicates that any missing portions of the record are presumed to support the trial court's ruling. *State v. Wolfe*, 99 Idaho 382, 390, 582 P.2d 728, 736 (1978); *State v. Williams*, 126 Idaho 39, 45, 878 P.2d 213, 219 (Ct. App.1994). The requested items are currently missing from the record. The jury instructions and proposed jury instructions are necessary to ensure that the jury was properly instructed and that instructions requested by defense counsel were properly considered or given by the district court. The motion hearing included the presentation of testimony and evidence on the State's Motions to use I.R.E. 404(b) evidence and defense counsel's motions to suppress and for a change of venue. Unless made part of the record on appeal, the events and testimony of this hearing will be presumed to support the district court's trial rulings and his sentencing decisions, which are now on appeal. In order to overcome this legal presumption and to have his case considered on its facts and merits, Mr. Herrera requests that the above-mentioned items be made part of the record on appeal and filed with the Idaho Supreme Court.

DATED this 21st day of January, 2014.


SPENCER J. HAHN
Deputy State Appellate Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 21st day of January, 2014, served a true and correct copy of the attached OBJECTION TO THE RECORD by the method indicated below:

DOUGLAS PAYNE
ATTORNEY AT LAW
701 COLLEGE STREET
ST MARIES ID 83861

JAMES E SIEBE
ATTORNEY AT LAW
608 NORTHWEST BLVD. STE 101
COEUR D' ALENE ID 83814

JULIE FARLAND
COURT REPORTER
401 EAST FRONT AVENUE
COEUR D' ALENE ID 83814

KENNETH K. JORGENSEN
DEPUTY ATTORNEY GENERAL
Hand delivered to Attorney General's mailbox at Supreme Court

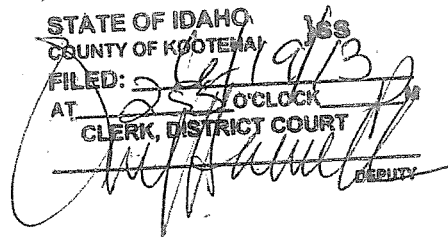


NANCY SANDOVAL
Administrative Assistant

SJH/ns

From: Siebe Law Offices : (208) 769 Judge Fax: +1 (208) 769-3443 Page 1 of 42 03/05/2013 4:10 PM

SIEBE LAW OFFICES, PLLC
JAMES E. SIEBE, ISBN 2362
608 Northwest Blvd., Ste. 101
Coeur d' Alene, ID 83814
Phone: (208) 765-8188
Moscow: (208) 883-0622
Fax: (208) 882-8769



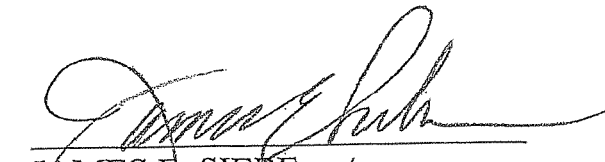
IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BENEWAH

STATE OF IDAHO,)	Case No. CR-2011-2053
)	
Plaintiff,)	
)	
vs.)	DEFENDANT'S PROPOSED
)	JURY INSTRUCTIONS
JOSEPH D. HERRERA,)	
)	
Defendant.)	

COMES NOW the defendant, by and through his attorney of record, and
presents to the Court the enclosed jury instructions for consideration for use at trial.

DATED this 5 day of March, 2013.

SIEBE LAW OFFICES, PLLC


JAMES E. SIEBE,
Attorney for Defendant

CERTIFICATE OF SERVICE

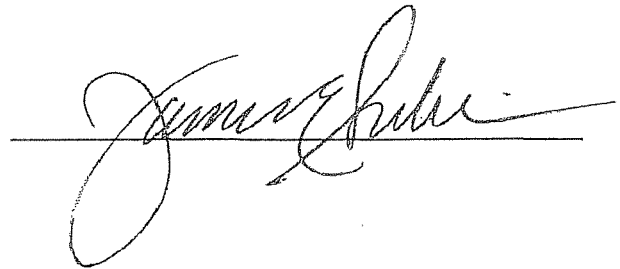
I hereby certify that on the 5 day of March, 2013, I served a true and correct copy of the foregoing document by the method indicated and addressed to the following:

Honorable Judge Gibler
700 Bank Street
P.O. Box 527
Wallace, ID 83873

() U.S. Mail
() Hand Delivered
() Overnight Mail
(☒) Facsimile to: (208) 753-3581

Benewah County Prosecutor
701 College St.
St. Maries, ID 83861

() U.S. Mail
() Hand Delivered
() Overnight Mail
(☒) Facsimile to: (208) 245-1915



A handwritten signature in cursive script, appearing to read "James E. Gibler", is written over a horizontal line.

From: Siebe, Dan Offices (208) 769 Judge x: +1 753-38 Pa 42 4:40

DEFENDANT'S PROPOSED INSTRUCTION NO. 1

This is the case of State of Idaho v. Joseph Duane. Herrera. Are the parties ready to proceed?

In a moment the Clerk will call the roll of the jury. When your name is called you will also be identified with a number. Please remember your number as we will be using it later in the jury selection process.

The Clerk will now call the roll of the jury.

Ladies and Gentlemen, you have been summoned as prospective jurors in the lawsuit now before us. The first thing we do in a trial is to select 12 jurors and perhaps, one or two alternate jurors from among you.

I am Fred Gibler, the judge in charge of the courtroom and this trial. The deputy clerk of court, _____, marks the trial exhibits and administers oaths to you jurors and to the witnesses. The bailiff, _____, will assist me in maintaining courtroom order and working with the jury.

Each of you is qualified to serve as a juror of this court. This call upon your time does not frequently come to you, but is part of your obligation for your citizenship in this state and country. No one should avoid fulfilling this obligation except under the most pressing circumstances. Service on a jury is a civic and patriotic obligation which all good citizens should perform.

To assist you with the process of selection of a jury, I will introduce you to the

parties and their lawyers and tell you in summary what this action is about. When I introduce an individual would you please stand and briefly face the jury panel and then retake your seat.

The State of Idaho is the plaintiff in this action. The lawyer representing the state is Douglas P. Payne, the Benewah County Prosecutor.

The defendant in this action is Joseph Duane Herrera. The lawyer representing Mr. Herrera is James Siebe.

I will now read you the pertinent portion of the information which sets forth the charge against Mr. Herrera. The information is not to be considered as evidence but is a mere formal charge against Mr. Herrera. You must not consider it as evidence of his guilt and you must not be influenced by the fact that a charge has been filed.

The information charges:

"that the said Joseph Duane Herrera, on or about the 25th day of December, 2011, in the County of Benewah, State of Idaho, did willfully, unlawfully, deliberately, and with malice aforethought, but without premeditation, kill and murder Stephanie Comack, a human being, by placing a .380 handgun against her head and pulling the trigger, from which she died.

Mr. Herrera has pled not guilty to these charges. Under our law and system of justice, Mr. Herrera is presumed to be innocent. The effect of this presumption is to

require the state to prove his guilt beyond a reasonable doubt in order to support a conviction against him.

As the judge in charge of this courtroom, it is my duty, at various times during the course of this trial, to instruct you as to the law that applies to this case.

The duty of the jury is to determine the facts; to apply the law set forth in the instructions to those facts, and in this way to decide the case. In applying the Court's instructions as to the controlling law, you must follow those instructions regardless of your opinion of what the law is or what the law should be, or what any lawyer may state the law to be.

During the course of this trial, including the jury selection process, you are instructed that you are not to discuss this case among yourselves or with anyone else, nor to form any opinion as to the merits of the case until after the case has been submitted to you for your determination.

We will now call an initial selection of _____ jurors. As your name is called, please take a seat as directed by the bailiff. The clerk will please draw the initial jurors' names.

**** The clerk calls the jurors ****

In this part of the jury selection, you will be asked questions touching on your qualifications to serve as jurors in this particular case. This part of the case is known as the voir dire examination.

Voir dire examination is for the purpose of determining if your decision in this case would in any way be influenced by opinions which you now hold or by some personal experience or special knowledge which you may have concerning the subject matter to be tried. The object is to obtain twelve persons who will impartially try the issues of this case upon the evidence presented in this courtroom without being influenced by any other factors.

Please understand that this questioning is not for the purpose of prying into your affairs for personal reasons but is only for the purpose of obtaining an impartial jury.

Each question has an important bearing upon your qualifications as a juror and each question is based upon a requirement of the law with respect to such qualifications. Each question is asked each of you, as though each of you were being questioned separately.

If your answer to any question is yes, please raise your hand. You will then be asked to identify yourself both by name and juror number.

At this time I would instruct both sides to avoid repeating any question during this voir dire process which has already been asked. I would ask counsel to note, however, that you certainly have the right to ask follow-up questions of any individual juror based upon that juror's response to any previous question.

The jury should be aware that during and following the voir dire examination one or more of you may be challenged.

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 2

During the course of this trial, including the jury selection process, you are instructed that you are not to discuss this case among yourselves or with anyone else, nor to form an opinion as to the merits of the case until after the case has been submitted to you for your determination.

ICJI 002

I.C. § 19-2127

Given _____ Refused _____
Modified _____ Covered ☒
Other _____
Judge: _____

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 3

Now that you have been sworn as jurors to try this case, I want to go over with you what will be happening. I will describe how the trial will be conducted and what we will be doing. At the end of the trial I will give you more detailed guidance on how you are to reach your decision.

Because the state has the burden of proof, it goes first. After the state's opening statement, the defense may make an opening statement, or may wait until the state has presented its case.

The state will offer evidence that it says will support the charge against Mr. Herrera. The defense may then present evidence, but is not required to do so. If the defense does present evidence, the state may then present rebuttal evidence. This is evidence offered to answer the defense's evidence.

After you have heard all the evidence, I will give you additional instructions on the law. After you have heard the instructions, the state and the defense will each be given time for closing arguments. In their closing arguments, they will summarize the evidence to help you understand how it relates to the law. Just as the opening statements are not evidence, neither are the closing arguments. After the closing arguments, you will leave the courtroom together to make your decision.

From: Sieb Office: (208) 3769 Judge Fax: + 753-3 P of 42 3 4:4

During your deliberations, you will have with you my instructions, the exhibits
admitted into evidence and any notes taken by you in court.

ICJI 101

Given _____ Refused _____
Modified _____ Covered ☒
Other _____
Judge: _____

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 3

It is important that as jurors and officers of this court you obey the following instructions at any time you leave the jury box, whether it be for recesses of the court during the day or when you leave the courtroom to go home at night.

First, do not talk about this case either among yourselves or with anyone else during the course of the trial. In fairness to Mr. Herrera and to the state of Idaho, you should keep an open mind throughout the trial and not form or express an opinion about the case. You should only reach your decision after you have heard all the evidence, after you have heard my final instruction and after the final arguments. You may discuss this case with the other members of the jury only after it is submitted to you for your decision. All such discussion should take place in the jury room.

Second, do not let any person talk about this case in your presence. If anyone does talk about it, tell them you are a juror on the case. If they won't stop talking, report that to the bailiff as soon as you are able to do so. You should not tell any of your fellow jurors about what has happened.

Third, during this trial do not talk with any of the parties, their lawyers or any witnesses. By this, I mean not only do not talk about the case, but do not talk at all, even to pass the time of day. In no other way can all parties be assured of the fairness they are entitled to expect from you as jurors.

Fourth, during this trial do not make any investigation of this case or inquiry

outside of the courtroom on your own. Do not go to any place mentioned in the testimony without an explicit order from me to do so. You must not consult any books, dictionaries, encyclopedias or any other source of information unless I specifically authorize you to do so.

Fifth, you must base your verdict solely on what is presented in court and not upon any internet, newspaper, radio, television or other account of what may have happened.

ICJI 108 (MODIFIED)

Given _____ Refused _____
Modified _____ Covered ☒
Other _____
Judge: _____

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 4

Your duties are to determine the facts, to apply the law set forth in my instructions to those facts, and in this way to decide the case. In so doing, you must follow my instructions regardless of your own opinion of what the law is or should be, or what either side may state the law to be. You must consider them as a whole, not picking out one and disregarding others. The order in which the instructions are given has no significance as to their relative importance. The law requires that your decision be made solely upon the evidence before you. Neither sympathy nor prejudice should influence you in your deliberations. Faithful performance by you of these duties is vital to the administration of justice.

In determining the facts, you may consider only the evidence admitted in this trial. This evidence consists of the testimony of the witnesses, the exhibits offered and received, and any stipulated or admitted facts. The production of evidence in court is governed by rules of law. At times during the trial, an objection may be made to a question asked a witness, or to a witness's answer, or to an exhibit. This simply means that I am being asked to decide a particular rule of law. Arguments on the admissibility of evidence are designed to aid the Court and are not to be considered by you nor affect your deliberations. If I sustain an objection to a question or to an exhibit, the witness may not answer the question or the exhibit may not be considered. Do not attempt to guess what the answer might have been or what the exhibit might

Tom. Siebe Law Offices (208) 69 Judge T. J. Siebe
have shown. Similarly, if I tell you not to consider a particular statement or exhibit you should put it out of your mind, and not refer to it or rely on it in your later deliberations.

During the trial I may have to talk with the parties about the rules of law which should apply in this case. Sometimes we will talk here at the bench. At other times I will excuse you from the courtroom so that you can be comfortable while we work out any problems. You are not to speculate about any such discussions. They are necessary from time to time and help the trial run more smoothly.

Some of you have probably heard the terms "circumstantial evidence," "direct evidence" and "hearsay evidence." Do not be concerned with these terms. You are to consider all the evidence admitted in this trial.

However, the law does not require you to believe all the evidence. As the sole judges of the facts, you must determine what evidence you believe and what weight you attach to it.

There is no magical formula by which one may evaluate testimony. You bring with you to this courtroom all of the experience and background of your lives. In your everyday affairs you determine for yourselves whom you believe, what you believe, and how much weight you attach to what you are told. The same considerations that you use in your everyday dealings in making these decisions are the considerations which you should apply in your deliberations.

In deciding what you believe, do not make your decision simply because more witnesses may have testified one way than the other. Your job is to think about the testimony of each witness you heard and decide how much you believe of what he or she had to say.

A witness who has special knowledge in a particular matter may give his or her opinion on that matter. In determining the weight to be given such opinion, you should consider the qualifications and credibility of the witness and the reasons given for his or her opinion. You are not bound by such opinion. Give it the weight, if any, to which you deem it entitled.

ICJI 104

Given _____ Refused _____
Modified _____ Covered ☒
Other _____
Judge: _____

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 5

If during the trial I say or do anything which suggests to you that I am inclined to favor the claims or position of any party, you will not permit yourself to be influenced by any such suggestion. I will not express nor intend to express, nor will I intend to intimate, any opinion as to which witnesses are or are not worthy of belief; what facts are or are not established; or what inferences should be drawn from the evidence. If any expression of mine seems to indicate an opinion relating to any of these matters, I instruct you to disregard it.

ICJI 105

Given _____ Refused _____
Modified _____ Covered ☒
Other _____
Judge: _____

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 6

Under our law and system of justice, Mr. Herrera is presumed to be innocent. The presumption of innocence means two things.

First, the state has the burden of proving Mr. Herrera guilty. The state has that burden throughout the trial. Thus Mr. Herrera, although accused, begins the trial with a clean slate with no evidence against him. He is never required to prove his innocence, nor does he ever have to produce any evidence at all.

Second, the state must prove the alleged crime beyond a reasonable doubt. Mr. Herrera is presumed to be innocent. This presumption places upon the state the burden of proving him guilty beyond a reasonable doubt. If, after considering all the evidence and my instructions on the law, you have a reasonable doubt as to Mr. Herrera's guilt, you must return a verdict of not guilty.

A reasonable doubt is a doubt based on reason and common sense. It is the kind of doubt which would make an ordinary person hesitant to act in the most

important affairs of his or her own life. If after considering all the evidence you have a reasonable doubt about Mr. Herrera's guilt, you must find him not guilty.

ICJI 103 and 103a (MODIFIED)

Taylor v. Kentucky, 436 U.S. 478 (1977); Holland v. United States, 348 U.S. 121, 75 S.Ct. 127, 99 L.Ed. 150 (1954); State v. Taylor, 76 Idaho 358, 362, 283 P.2d 582, 585 (1955).

Given _____ Refused _____
Modified _____ Covered ☒
Other _____
Judge: _____

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 7

In every crime or public offense there must exist a union or joint operation of act
and intent.

I.C. § 18-114

ICJI 305

Given ☒ Refused _____
Modified _____ Covered _____
Other _____
Judge: _____

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 8

Def Requested # 8

Certain evidence was admitted for a limited purpose.

At the time this evidence was admitted you were admonished that it could not be considered by you for any purpose other than the limited purpose for which it was admitted.

Do not consider such evidence for any purpose except the limited purpose for which it was admitted.

ICJI 308

Given ☒ Refused _____
Modified _____ Covered _____
Other _____
Judge: _____

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 9

You, the jurors, are the exclusive judges of the credibility of the witnesses, and it is your duty to reconcile any conflict that may appear in the testimony, as far as may be in your power, upon the theory that each witness has sworn to tell the truth.

If you believe that a witness, or any number of witnesses, have willfully and knowingly testified falsely, in regard to any material matter, you may disregard such witness's testimony, except in so far as it is corroborated by other credible evidence or by facts or circumstances appearing in the case.

In determining the credibility of any witness you may consider any matter that has a tendency in reason to prove or disprove the truthfulness of any witness's testimony, including but not limited to the following:

The witness's demeanor while testifying and the manner in which the witness testifies;

Character of the testimony;

The extent of the witness's capacity to perceive, to recollect, or to communicate any matter about which is testified to;

Extent of the witness's opportunity to perceive any matter about which is testified to;

The witness's character for honesty or veracity or their opposites;

The existence or nonexistence of bias, interest, or other motive;

A statement previously made by the witness that is consistent with that witness's testimony;

A statement previously made by the witness that is inconsistent with that witness's testimony;

The existence or nonexistence of any fact testified to by the witness;

The witness's attitude toward the action in which is being testified about or toward the giving of the testimony;

Any witness's admission of untruthfulness;

Any witness's prior conviction of a felony.

State v. Holm, 478 P.2d 284 (Idaho 1970); State v. McPherson, 291 P. 313 (Idaho 1930). California Criminal Jury Instruction 2.20

Given _____ Refused
Modified _____ Covered _____
Other _____
Judge: _____

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 10

Second degree murder is the killing of a human being without legal justification or excuse and with malice aforethought.

The killing of a human being is legally justified when done in defense of self, another, or property. You will be instructed on the elements of legal justification in a later instruction.

ICJI 701 (MODIFIED)

2005 version

State v. Porter, 128 P.3d 908 (Idaho 2005).

I.C. §§ 18-4001, 18-4009

Given _____ Refused ✓

Modified _____ Covered ✓

Other _____

Judge: _____

ICJI 701 MURDER DEFINED

INSTRUCTION NO.

Murder is the killing of a human being [without legal justification or excuse and] [with malice aforethought]

[or]

[by the intentional application of torture]

[or]

[in the perpetration of, or attempt to perpetrate, [an aggravated battery on a child under twelve (12) years of age] [arson] [rape] [robbery] [burglary] [kidnapping] [mayhem] [an act of terrorism] [use of a [weapon of mass destruction] [or] [biological weapon] [or] [chemical weapon]]]

[A "human being" includes a human embryo or fetus.]

[The killing of a human being is legally [justified] [or] [excused] when (describe the particular justification or excuse, such as "done in self-defense"). You will be instructed later on the elements of legal [justification] [and] [excuse.]

Comment

For legal justification see I.C. § 18-4009. For further instruction on legal justification see ICJI 1514 and ICJI 1515. Excusable homicide is defined in I.C. § 18-4012. For instructions on excusable homicide and self-defense see ICJI 1516 to ICJI 1521.

The elements of murder by torture are discussed in *State v. Tribe*, 123 Idaho 721, 852 P.2d 87 (1993).

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 11

Malice may be express or implied.

Malice is express when there is manifested a deliberate intention to unlawfully kill a human being.

Malice is implied when:

1. The killing resulted from an intentional act,
2. The natural consequences of the act are dangerous to human life, and
3. The act was performed without considerable provocation, and
4. The defendant acted with an abandoned and malignant heart.

Acting with an abandoned and malignant heart means that the defendant's actions were performed with a reckless disregard for life where any reasonable man would realize his actions to be both unjustifiable and pose a very high risk of death or serious bodily injury.

The word aforethought does not imply deliberation or the lapse of time. It only

means that the malice must precede rather than follow the act.

I.C. §18-4002

762

ICJI 703 (MODIFIED)

State v. Porter, 128 P.3d 908 (Idaho 2005); United States v. Paul, 37 F.3d 496 (9th Cir. 1994); Fenstermaker v. State, 912 P.2d 653 (Idaho App. 1995) *overruled on other grounds by Porter, supra*.

Given _____ Refused ✓
Modified _____ Covered _____
Other _____
Judge: _____

See 702

INSTRUCTION NO.

Malice may be express or implied.

Malice is express when there is manifested a deliberate intention unlawfully to kill a human being.

Malice is implied when:

1. The killing resulted from an intentional act,
2. The natural consequences of the act are dangerous to human life, and
3. The act was deliberately performed with knowledge of the danger to, and with conscious disregard for, human life.

When it is shown that a killing resulted from the intentional doing of an act with express or implied malice, no other mental state need be shown to establish the mental state of malice aforethought. The mental state constituting malice aforethought does not necessarily require any ill will or hatred of the person killed.

The word "aforethought" does not imply deliberation or the lapse of time. It only means that the malice must precede rather than follow the act.

Comment

I.C. § 18-4002.

Do not use this instruction if the only murder charge is felony murder or murder by the intentional application of torture because these crimes do not require proof of malice aforethought. Idaho Code § 18-4001; *State v. Pratt*, 125 Idaho 594, 873 P.2d 848 (1994); *State v. Lankford*, 116 Idaho 860, 781 P.2d 197 (1989).

There is no legal distinction between malice and malice aforethought. *State v. Dunlap*, 125 Idaho 530, 873 P.2d 784 (1993).

When the charge is attempted second degree murder, this instruction must be amended to delete any reference to implied malice. The intent to kill is required for attempted second degree murder. *State v. Buckley*, 131 Idaho 164, 953 P.2d 604 (1998).

2005 version

INSTRUCTION NO.

Malice may be express or implied.

Malice is express when there is manifested a deliberate intention unlawfully to kill a human being.

Malice is implied when:

1. The killing resulted from an intentional act,
2. The natural consequences of the act are dangerous to human life, and
3. The act was deliberately performed with knowledge of the danger to, and with conscious disregard for, human life.

When it is shown that a killing resulted from the intentional doing of an act with express or implied malice, no other mental state need be shown to establish the mental state of malice aforethought. The mental state constituting malice aforethought does not necessarily require any ill will or hatred of the person killed.

The word "aforethought" does not imply deliberation or the lapse of time. It only means that the malice must precede rather than follow the act.

Comment

I.C. § 18-4002.

Do not use this instruction if the only murder charge is felony-murder because felony-murder does not require malice. *State v. Pratt*, 125 Idaho 594, 873 P.2d 848 (1994); *State v. Lankford*, 116 Idaho 860, 781 P.2d 197 (1989).

There is no legal distinction between malice and malice aforethought. *State v. Dunlap*, 125 Idaho 530, 873 P.2d 784 (1993).

When the charge is attempted second degree murder, this instruction must be amended to delete any reference to implied malice. The intent to kill is required for attempted second degree murder. *State v. Buckley*, 131 Idaho 164, 953 P.2d 604 (1998).

[Revised July 2005]

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 12

In order for Mr. Herrera to be guilty of second degree murder, the state must prove each of the following beyond a reasonable doubt:

- 1. On or about December 25, 2011;
- 2. In the state of Idaho;
- 3. Joseph Herrera killed Stephanie Comack;
- 4. Mr. Herrera acted without justification or excuse; and
- 5. Mr. Herrera acted with malice aforethought.

If any of the above has not been proven beyond a reasonable doubt, then you must find Mr. Herrera not guilty of second degree murder. If you find that all of the above have been proven beyond a reasonable doubt, you must find Mr. Herrera guilty.

now 705

ICJI 704 (MODIFIED)

I.C. § 18-4001; State v. Porter, 128 P.3d 908 (Idaho 2005)

Given _____ Refused ✓
Modified _____ Covered ✓
Other _____
Judge: _____

ICJI 705 SECOND DEGREE MURDER

INSTRUCTION NO.

In order for the defendant to be guilty of Second Degree Murder, the state must prove each of the following:

1. On or about [date]
2. in the state of Idaho
3. the defendant [name] engaged in conduct which caused the death of [name of decedent],
4. the defendant acted without justification or excuse, and
5. [with malice aforethought] [or] [by the intentional application of torture which resulted in the death of [name of decedent]].

If you find that the state has failed to prove any of the above, you must find the defendant not guilty of second degree murder. If you find that all of the above have been proven beyond a reasonable doubt, then you must find the defendant guilty of second degree murder.

Comment

I.C. § 18-4001, 18-4003.

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 13

If your unanimous verdict is that Mr. Herrera is not guilty of second degree murder, you must acquit him of that charge. In that event, you must next consider the included offenses of voluntary manslaughter and involuntary manslaughter.

ICJI 225

Given _____ Refused ☒
Modified _____ Covered ☒
Other _____
Judge: _____

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 14

The distinction between murder and manslaughter is that murder requires malice aforethought, while manslaughter does not.

There is no malice aforethought if the defendant acted with adequate provocation, or in the heat of passion, or upon a sudden quarrel, even if the defendant intended to kill the deceased. The provocation is adequate if it would have caused a reasonable person, in the same circumstances, to lose self control and act on impulse and without reflection.

Heat of passion may be provoked by fear, rage, anger, terror, revenge or other emotion. Adequate provocation does not exist, however, when a person acts from choice and malice aforethought even though experiencing any number of emotions.

State v. Porter, 2005 WL 14089 (Idaho App.)(court of appeals case for porter, substantially affirmed by ISC in State v. Porter, 128 P.3d 908 (Idaho 2005)).

2005 version
ICJI 707
Given _____ Refused ☒
Modified _____ Covered ☒
Other _____
Judge: _____

ICJI 707 MURDER AND MANSLAUGHTER DISTINGUISHED

INSTRUCTION NO.

The distinction between murder and manslaughter is that murder requires malice aforethought, while manslaughter does not.

There is no malice aforethought if the defendant acted with adequate provocation while in the heat of passion or a sudden quarrel, even if the defendant intended to kill the deceased. The provocation would have been adequate if it would have caused a reasonable person, in the same circumstances, to lose self-control and act on impulse and without reflection.

Heat of passion may be provoked by fear, rage, anger, terror, revenge or other emotion. Adequate provocation does not exist, however, when a person acts from choice and malice aforethought even though experiencing any number of emotions.

[The defendant would not be acting in heat of passion or sudden quarrel if sufficient time elapsed after the provocation for a reasonable person in the same circumstances to have regained self-control and for reason to have returned.]

Comment

The bracketed paragraph should be used if there is an issue as to the lapse of time between the provocation and the homicide.

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 15

Voluntary Manslaughter occurs in two situations:

1. A defendant, acting with adequate provocation, or upon a sudden quarrel, or in the heat of passion, unintentionally kills another human being and the actions show a conscious disregard for human life by knowingly endangering the life of another; or
2. The defendant kills another human being intentionally but any malice is mitigated by the existence of adequate provocation, or the defendant acting upon a sudden quarrel, or in the heat of passion.

State v. Porter, 128 P.3d 908 (Idaho 2005); State v. Porter, 2005 WL 14089 (Idaho App.); California v. Lasko, 999 P.2d 666 (Cal. 2000).

ICJI 708 (MODIFIED)

Given _____ Refused ☒
Modified _____ Covered ☒
Other _____
Judge: _____

ICJI 708 VOLUNTARY MANSLAUGHTER

INSTRUCTION NO.

In order for the defendant to be guilty of Voluntary Manslaughter, the state must prove each of the following:

1. On or about [date]
2. in the state of Idaho
3. the defendant [name] engaged in conduct which caused the death of [name of decedent], and
4. the defendant acted unlawfully upon a sudden quarrel or heat of passion and without malice aforethought in causing such death.

If any of the above has not been proven beyond a reasonable doubt, you must find the defendant not guilty. If each of the above has been proven beyond a reasonable doubt, then you must find the defendant guilty of voluntary manslaughter.

Comment

I.C. § 18-4006.

Use the bracketed material in paragraph number 4 if this instruction is given as an included offense to murder, after giving the transition instruction, ICJI 225.

If the court is going to instruct on the included offense of Involuntary Manslaughter, the transition instruction, ICJI 225, should be given along with the appropriate Involuntary Manslaughter instruction following the last sentence of this instruction.

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 16

In order for Mr. Herrera to be found guilty of voluntary manslaughter, the state must prove each of the following beyond a reasonable doubt:

1. On or about December 25, 2011;
2. In the state of Idaho;
3. Joseph Herrera engaged in conduct which caused the death of Stephanie Comack; and
4. Mr. Herrera acted unlawfully upon a sudden quarrel or heat of passion and without malice aforethought in causing such death; and
- 5a. Mr. Herrera intentionally killed Stephanie Comack; or
- 5b. Mr. Herrera unintentionally killed Stephanie Comack but acted with conscious disregard for human life and knew that his actions could kill Stephanie Comack; and
6. Mr. Herrera acted without justification or excuse.

If any of the above has not been proven beyond a reasonable doubt, then you must find Mr. Herrera not guilty of voluntary manslaughter. If each of the above has

been proven beyond a reasonable doubt, you must find Mr. Herrera guilty of
voluntary manslaughter.

California v. Lasko, 999 P.2d 666 (Cal 2000); State v. Porter, 128 P.3d 909 (Idaho
2005).

I.C. § 18-4006

ICJI 708 (MODIFIED)

Given _____ Refused ✓
Modified _____ Covered ✓
Other _____
Judge: _____

ICJI 708 VOLUNTARY MANSLAUGHTER

INSTRUCTION NO.

In order for the defendant to be guilty of Voluntary Manslaughter, the state must prove each of the following:

1. On or about [date]
2. in the state of Idaho
3. the defendant [name] engaged in conduct which caused the death of [name of decedent], and
4. the defendant acted unlawfully upon a sudden quarrel or heat of passion and without malice aforethought in causing such death.

If any of the above has not been proven beyond a reasonable doubt, you must find the defendant not guilty. If each of the above has been proven beyond a reasonable doubt, then you must find the defendant guilty of voluntary manslaughter.

Comment

I.C. § 18-4006.

Use the bracketed material in paragraph number 4 if this instruction is given as an included offense to murder, after giving the transition instruction, ICJI 225.

If the court is going to instruct on the included offense of Involuntary Manslaughter, the transition instruction, ICJI 225, should be given along with the appropriate Involuntary Manslaughter instruction following the last sentence of this instruction.

DEFENDANT’S PROPOSED JURY INSTRUCCION NO.17

Involuntary manslaughter is the unintentional and unlawful killing of another human being.

I.C. § 18-4006 (2)

State v. Porter, 128 P.3d 909 (Idaho 2005)

ICJI 711 (MODIFIED)

Given _____ Refused ✓
Modified _____ Covered ✓
Other _____
Judge: _____

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 18

In order for Mr. Herrera to be guilty of involuntary manslaughter, the state must prove each of the following beyond a reasonable doubt:

1. On or about December 25, 2011;
2. In the state of Idaho;
3. Joseph Herrera unlawfully and unintentionally killed Stephanie Comack, and
4. Mr. Herrera used a deadly weapon (a gun) that caused the killing, and
5. Mr. Herrera acted in a manner that was reckless, but such recklessness did not rise to the reckless disregard for human life found in malice.

If any of the above has not been proven beyond a reasonable doubt, then you must find Mr. Herrera not guilty of involuntary manslaughter. If each of the above has been proven beyond a reasonable doubt, you must find him guilty.

I.C. § 18-4006 (2)

See State v. Porter, 128 P.3d 908 (Idaho 2005).

ICJI 712 (modified)

Given _____ Refused ✓
Modified _____ Covered ✓
Other _____
Judge: _____

ICJI 712 INVOLUNTARY MANSLAUGHTER-NEGLIGENT USE OF DEADLY
WEAPON

INSTRUCTION NO.

In order for the defendant to be guilty of Involuntary Manslaughter by negligent use of a deadly weapon, the state must prove each of the following:

1. On or about [date]
2. in the state of Idaho
3. the defendant [name] used a [firearm] [or] [deadly weapon] with reckless disregard of the consequences and of the rights of others,
4. producing the death of [name of decedent].

A "deadly weapon" is any object, instrument or weapon which is used in such a manner as to be capable of producing, and likely to produce, death or great bodily injury.

If any of the above has not been proven beyond a reasonable doubt, you must find the defendant not guilty. If each of the above has been proven beyond a reasonable doubt, then you must find the defendant guilty.

Comment

I.C. § 18-4006(2).

In order for a negligent act to be criminal, it must be more than the failure to exercise ordinary care. The reference to negligence in a criminal statute means such negligence as amounts to a reckless disregard of the consequences and of the rights of others. *State v. Hintz*, 61 Idaho 411, 102 P.2d 639 (1940); *State v. McMahan*, 57 Idaho 240, 65 P.2d 156 (1937); IC § 18-114.

Hands or other body parts or appendages may not, by themselves, constitute deadly weapons under the aggravated assault and aggravated battery statutes. *State v. Townsend*, 124 Idaho 881, 865 P.2d 972 (1993). A boot can be a deadly weapon under IC § 18-905. *State v. Huston*, 121 Idaho 738, 828 P.2d 301 (1992). In general, an instrumentality may be a deadly weapon if it is capable of being used in a deadly manner and the evidence indicates that its possessor intended on that occasion to use it as a weapon. *Townsend*, at 886, 865 P.2d at 977, citing *Huston*, and *State v.*

Missenberger, 86 Idaho 321, 386 P.2d 559 (1963). A pocket knife may be a deadly weapon, depending on the circumstances of its use. *State v. Lenz*, 103 Idaho 632, 651 P.2d 566 (Ct. App. 1982).

2005 version

ICJI 712 INVOLUNTARY MANSLAUGHTER-NEGLIGENT USE OF DEADLY WEAPON

INSTRUCTION NO.

In order for the defendant to be guilty of Involuntary Manslaughter by negligent use of a deadly weapon, the state must prove each of the following:

1. On or about [date]
2. in the state of Idaho
3. the defendant [name] used a [firearm] [or] [deadly weapon] with reckless disregard of the consequences and of the rights of others,
4. producing the death of [name of decedent].

A "deadly weapon" is any object, instrument or weapon which is used in such a manner as to be capable of producing, and likely to produce, death or great bodily injury.

If any of the above has not been proven beyond a reasonable doubt, you must find the defendant not guilty. If each of the above has been proven beyond a reasonable doubt, then you must find the defendant guilty.

Comment

I.C. § 18-4006(2).

In order for a negligent act to be criminal, it must be more than the failure to exercise ordinary care. The reference to negligence in a criminal statute means such negligence as amounts to a reckless disregard of the consequences and of the rights of others. *State v. Hintz*, 61 Idaho 411, 102 P.2d 639 (1940); *State v. McMahan*, 57 Idaho 240, 65 P.2d 156 (1937); IC § 18-114.

Hands or other body parts or appendages may not, by themselves, constitute deadly weapons under the aggravated assault and aggravated battery statutes. *State v. Townsend*, 124 Idaho 881, 865 P.2d 972 (1993). A boot can be a deadly weapon under IC § 18-905. *State v. Huston*, 121 Idaho 738, 828 P.2d 301 (1992). In general, an instrumentality may be a deadly weapon if it is capable of being used in a deadly manner and the evidence indicates that its possessor intended on that occasion to use it as a weapon. *Townsend*, at 886, 865 P.2d at 977, citing *Huston*, and *State v. Missenberger*, 86 Idaho 321, 386 P.2d 559 (1963). A pocket knife may be a deadly weapon, depending on the

60

DEFENDANT'S PROPOSED JURY INSTRUCTION NO.19

Murder differs from involuntary manslaughter in two respects:

1. Murder requires malice aforethought; and
2. The defendant's awareness of risk for involuntary manslaughter is short of the extreme disregard for human life, or malice, found in murder.

United States v. Dixon, 419 F.2d 2888 (D.C. Cir. 1996)(concurring opinion); United States v. One Star, 979 F.2d 1319 (8th Cir. 1992); See also United States v. Cox, 509 F.2d 390 (D.C. Cir. 1974).

Given _____ Refused _____ ✓
Modified _____ Covered _____ ✓
Other _____
Judge: _____

ICJI 707 MURDER AND MANSLAUGHTER DISTINGUISHED

INSTRUCTION NO.

The distinction between murder and manslaughter is that murder requires malice aforethought, while manslaughter does not.

There is no malice aforethought if the defendant acted with adequate provocation while in the heat of passion or a sudden quarrel, even if the defendant intended to kill the deceased. The provocation would have been adequate if it would have caused a reasonable person, in the same circumstances, to lose self-control and act on impulse and without reflection.

Heat of passion may be provoked by fear, rage, anger, terror, revenge or other emotion. Adequate provocation does not exist, however, when a person acts from choice and malice aforethought even though experiencing any number of emotions.

[The defendant would not be acting in heat of passion or sudden quarrel if sufficient time elapsed after the provocation for a reasonable person in the same circumstances to have regained self-control and for reason to have returned.]

Comment

The bracketed paragraph should be used if there is an issue as to the lapse of time between the provocation and the homicide.

This is same as 2005 version

DEFENDANT’S PROPOSED JURY INSTRUCTION NO.20

The State is required to prove beyond a reasonable doubt that Mr. Herrera’s actions were the proximate cause of death of Stephanie Comack.

To show proximate cause, the State must prove that Mr. Herrera’s actions solely were responsible for the death of Stephanie Comack.

J?

A proximate cause is one which played a substantial part in bringing about the death, so that death was the direct result or a reasonably probable consequence of the defendant’s act.

126 Idaho 892

State v. Johnson, 894 P.2d 125 (Idaho 1995)(whether defendant’s action proximately cause injury was appropriate for jury instruction where evidence was presented that questioned the reason for the injury); State v. Tiffany, 88 P.3d 728 (Idaho 2004)(no evidence was presented to show any other excuse for cause of death, therefore, instruction was not allowed).

Ninth Circuit Model CJI 8.92.

Given _____ Refused ✓
Modified _____ Covered ✓
Other _____
Judge: _____

139
Idaho 909

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 21

You have been instructed as to all the rules of law that may be necessary for you to reach a verdict. Whether some of the instructions will apply will depend upon your determination of the facts. You will disregard any instruction which applies to a state of facts which you determine does not exist. You must not conclude from the fact that an instruction has been given that the Court is expressing any opinion as to the facts.

ICJI 205

Given _____ Refused _____
Modified _____ Covered ☒
Other _____
Judge: _____

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 22

The original instructions and the exhibits will be with you in the jury room. They are part of the official court record. For this reason please do not alter them or mark on them in any way.

The instructions are numbered for convenience in referring to specific instructions. There may or may not be a gap in the numbering of the instructions. If there is, you should not concern yourselves about such gap.

ICJI 206

Given ☒ Refused ☐
 Modified ☐ Covered ☐
 Other ☐
 Judge: ☐

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 23

Upon retiring to the jury room, select one of you as a presiding officer, who will preside over your deliberations. It is that person's duty to see that discussion is orderly; that the issues submitted for your decision are fully and fairly discussed; and that every juror has a chance to express himself or herself upon each question.

In this case, your verdict must be unanimous. When you all arrive at a verdict, the presiding officer will sign it and you will return it into open court.

Your verdict in this case cannot be arrived at by chance, by lot, or by compromise.

If, after considering all of the instructions in their entirety, and after having fully discussed the evidence before you, the jury determines that it is necessary to communicate with me, you may send a note by the bailiff. You are not to reveal to me or anyone else how the jury stands until you have reached a verdict or unless you are instructed by me to do so.

A verdict form suitable to any conclusion you may reach will be submitted to you with these instructions.

ICJI 207

Given _____ Refused _____
Modified _____ Covered ☒
Other _____
Judge: _____

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 24

I have outlined for you the rules of law applicable to this case and have told you of some of the matters which you may consider in weighing the evidence to determine the facts. In a few minutes counsel will present their closing remarks to you, and then you will retire to the jury room for your deliberations.

The arguments and statements of the attorneys are not evidence. If you remember the facts differently from the way the attorneys have stated them, you should base your decision on what you remember.

The attitude and conduct of jurors at the beginning of your deliberations are important. It is rarely productive at the outset for you to make an emphatic expression of your opinion on the case or to state how you intend to vote. When you do that at the beginning, your sense of pride may be aroused, and you may hesitate to change your position even if shown that it is wrong. Remember that you are not partisans or advocates, but are judges. For you, as for me, there can be no triumph except in the ascertainment and declaration of the truth.

As jurors you have a duty to consult with one another and to deliberate before making your individual decisions. You may fully and fairly discuss among yourselves all of the evidence you have seen and heard in this courtroom about this case, together with the law that relates to this case as contained in these instructions.

During your deliberations, you each have a right to re-examine your own views

and change your opinion. You should only do so if you are convinced by fair and honest discussion that your original opinion was incorrect based upon the evidence the jury saw and heard during the trial and the law as given you in these instructions.

Consult with one another. Consider each other's views, and deliberate with the objective of reaching an agreement, if you can do so without disturbing your individual judgment. Each of you must decide this case for yourself; but you should do so only after a discussion and consideration of the case with your fellow jurors.

However, none of you should surrender your honest opinion as to the weight or effect of evidence or as to the innocence or guilt of the defendant because the majority of the jury feels otherwise or for the purpose of returning a unanimous verdict.

ICJI 204

Given ☒ Refused ☐
Modified ☐ Covered ☐
Other ☐
Judge: ☐

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 10 A

Second degree murder is the killing of a human being without legal justification or excuse and with malice aforethought.

Murder is the killing of a human being [without legal justification or excuse and] [with malice aforethought

ICJI 701 (MODIFIED)

State v. Porter, 128 P.3d 908 (Idaho 2005).

I.C. §§ 18-4001, 18-4009

Given _____ Refused ✓
Modified _____ Covered ✓
Other _____
Judge: _____

ICJI 705 (AMENDED) SECOND DEGREE MURDER

DEFENDANT'S REQUESTED
INSTRUCTION NO: 25

Not
given
word

Before you may find Mr. Herrera guilty of Murder in the Second Degree as charged in Count I, the State must prove to you that Mr. Herrera willfully, unlawfully and deliberately caused the death of Stephanie Comack.

Deliberately, as charged by the State in Count I of the Information is defined as:

an intent to kill executed in a cool state of blood, not in sudden passion engendered by lawful or some just cause or provocation;
done with reflection;
a dispassionate weighing process and consideration of consequences before acting.

Unlawfully, as charged by the State in Count I of the Information, is defined as acting without legal justification or excuse.

Willfully, as charged by the State in Count I of the Information, means a purpose or willingness to commit the act charged in the Information.

Comment

The Idaho Supreme Court has recognized that jury instructions should mirror the allegations in the charging document:

In particular, the instructions should be tailored to fit the allegations in the complaint, information or indictment. Failure to do so may cause a fatal variance between the instructions and the charging document, which could deprive the defendant of the right to fair notice of the charges or leave the defendant open to the risk of double jeopardy. *See, State v. Tiffany*, 139 Idaho 909, 918-19, 88 P.3d 737-38 (2004); *State v. Windsor*, 110 Idaho 410, 417-18, 716 P.2d 1182, 1189-90 (1985). A statute will often provide that a particular crime can be committed in different ways. The jury should be instructed only on the particular manner of committing the crime that is alleged in the charging document. In addition, the instructions should not allow the jury to convict a defendant on the basis

of acts or injuries other than those alleged in the charging document.

SUPREME COURT OF THE STATE OF IDAHO, IDAHO CRIMINAL JURY INSTRUCTIONS, INTRODUCTION AND GENERAL DIRECTIONS FOR USE, *available at* http://www.isc.idaho.gov/idaaho_courts_e.htm.

Jury instructions must “include every element of the charged offense that the State is obligated to prove.” *State v. Halbesleben*, 139 Idaho 165, 169, 75 P.3d 219 (Ct. App. 2003). “Jury instructions that omit an element of the crime lighten the prosecution’s burden of proof and are impermissible.” *Id.* See also *McKay v. State*, 148 Idaho 567, 225 P.3d 700 (2010). Jury instructions that fail to require the state to prove every element of the offense violate due process and, thus, rise to the level of fundamental error. *State v. Hansen*, 148 Idaho 442, 224 P.3d 509 (Ct. App. 2009) (citing *Middleton v. McNeil*, 541 U.S. 433, 437 (2004); *State v. Anderson*, 144 Idaho 743, 749, 170 P.3d 886 (2997)). The jury instruction must “fairly and accurately reflect the applicable law.” *State v. Payne*, 134 Idaho 423, 425, 3 P.3d 1251 (2000). If the instructions misled the jury or prejudiced the defendant, the reviewing court must reverse the judgment or conviction. *Halbesleben*, 139 Idaho at 169.

“A trial judge should remain vigilant in observing the duty set forth in Idaho Code § 19-2132: ‘In charging the jury, the court must state to them all matters of law necessary for their information.’” SUPREME COURT OF THE STATE OF IDAHO, IDAHO CRIMINAL JURY INSTRUCTIONS, INTRODUCTION AND GENERAL DIRECTIONS FOR USE, *available at* http://www.isc.idaho.gov/idaaho_courts_e.htm. But see *State v. Adamcik*, No. 34639, 2011 WL 5923063, *24 (Idaho, Nov. 29, 2011) (noting, “Where the language of the indictment or information goes beyond alleging elements of the crime, it is mere surplusage that need not be proved. However, the inclusion of surplusage must not be allowed to prejudice a defendant in the context of his case” (internal citation omitted)); *State v. Hoffman*, 37 Idaho 897, 901, 55 P.3d 890 (Ct. App. 2002) (“a variance between a charging instrument and a jury instruction necessitates reversal only when it deprives the defendant of his right to fair notice or leaves him open to the risk of double jeopardy.” (internal citation omitted)); *State v. Draper*, 151 Idaho 576, 261 P.3d 853, 866 (2011) (finding trial court did not err for not instructing jury on definitions of willful and deliberate, because the defendant was attempting to insert legal definitions where the common definition [was] the appropriate one).

In this case, the Information charges that Mr. Herrera “...did willfully, unlawfully, deliberately, and with malice aforethought, but without premeditation, kill and murder Mrs. Larsen...” Accordingly, the terms “willfully, unlawfully, deliberately, and with malice aforethought,” are alleged as elements of the crime in the Information (*not mere surplusage*), which the state is obligated to prove

GIVEN _____
 REFUSED _____
 ACCEPTED _____
 MODIFIED _____
 COVERED _____
 JUDGE _____

ICJI 705 SECOND DEGREE MURDER

INSTRUCTION NO.

In order for the defendant to be guilty of Second Degree Murder, the state must prove each of the following:

1. On or about [date]
2. in the state of Idaho
3. the defendant [name] engaged in conduct which caused the death of [name of decedent],
4. the defendant acted without justification or excuse, and
5. [with malice aforethought] [or] [by the intentional application of torture which resulted in the death of [name of decedent]].

If you find that the state has failed to prove any of the above, you must find the defendant not guilty of second degree murder. If you find that all of the above have been proven beyond a reasonable doubt, then you must find the defendant guilty of second degree murder.

Comment

I.C. § 18-4001, 18-4003.

DEFENDANT'S REQUESTED
INSTRUCTION NO: 26

Not given
covered

Before you may find Mr. Herrera guilty of Murder in the Second Degree as charged in Count I, the State must prove to you that Mr. Herrera willfully, unlawfully and deliberately caused the death of Stephanie Comack.

Deliberately, as charged by the State in Count I of the Information is defined as:

an intent to kill executed in a cool state of blood, not in sudden passion engendered by lawful or some just cause or provocation;¹
done with reflection;²
a dispassionate weighing process and consideration of consequences before acting.³

Unlawfully, as charged by the State in Count I of the Information, is defined as acting without legal justification or excuse.

Willfully, as charged by the State in Count I of the Information, means a purpose or willingness to commit the act charged in the Information.⁴

Comment

The Idaho Supreme Court has recognized that jury instructions should mirror the allegations in the charging document:

In particular, the instructions should be tailored to fit the allegations in the

¹ See *State v. Dong Sing*, 35 Idaho 616, 208 P. 860 (1922); *State v. Koho*, 91 Idaho 450, 423, P.2d 1004 (1967).

²² See *Sheahan v. Smith*, No. 1:08-CV-00444-EJL, 2011 WL 1219681, *9 (D. Idaho, March 28, 2011) (slip copy).

³ See *Polk v. Sandoval*, 503 F.3d 903, 907 (9th Cir. 2007); *Elliot v. Williams*, No. 2:08-cv-00829-GMN, 2011 WL 4436648 (D. Nev., Sep. 23, 2011) (citing *Chambers v. McDaniel*, 549 F.3d 1191, 1201 (9th Cir. 2008)).

⁴ See ICJI 340 comment. See, e.g., *State v. Aragon*, 107 Idaho 358, 690 P.2d 293 (1984) (willfully means that there was manifested a clear intent to take life, defined in context of first degree murder, as contrasted with definition of malice). But see *State v. Draper*, 151 Idaho 576, 261 P.3d 853 (2011) (discussing *Aragon*: "There, the distinction was between malice and willfulness and, unlike malice, which has a specific legal definition, the common definition of willfulness is applicable.").

complaint, information or indictment. Failure to do so may cause a fatal variance between the instructions and the charging document, which could deprive the defendant of the right to fair notice of the charges or leave the defendant open to the risk of double jeopardy. *See, State v. Tiffany*, 139 Idaho 909, 918-19, 88 P.3d 737-38 (2004); *State v. Windsor*, 110 Idaho 410, 417-18, 716 P.2d 1182, 1189-90 (1985). A statute will often provide that a particular crime can be committed in different ways. The jury should be instructed only on the particular manner of committing the crime that is alleged in the charging document. In addition, the instructions should not allow the jury to convict a defendant on the basis of acts or injuries other than those alleged in the charging document.

SUPREME COURT OF THE STATE OF IDAHO, IDAHO CRIMINAL JURY INSTRUCTIONS, INTRODUCTION AND GENERAL DIRECTIONS FOR USE, *available at* http://www.isc.idaho.gov/idaho_courts_e.htm.

Jury instructions must “include every element of the charged offense that the State is obligated to prove.” *State v. Halbesleben*, 139 Idaho 165, 169, 75 P.3d 219 (Ct. App. 2003). “Jury instructions that omit an element of the crime lighten the prosecution’s burden of proof and are impermissible.” *Id.* *See also McKay v. State* 148 Idaho 567, 225 P.3d 700 (2010). Jury instructions that fail to require the state to prove every element of the offense violate due process and, thus, rise to the level of fundamental error. *State v. Hansen*, 148 Idaho 442, 224 P.3d 509 (Ct. App. 2009) (citing *Middleton v. McNeil*, 541 U.S. 433, 437 (2004); *State v. Anderson*, 144 Idaho 743, 749, 170 P.3d 886 (2997)). The jury instruction must “fairly and accurately reflect the applicable law.” *State v. Payne*, 134 Idaho 423, 425, 3 P.3d 1251 (2000). If the instructions misled the jury or prejudiced the defendant, the reviewing court must reverse the judgment or conviction. *Halbesleben*, 139 Idaho at 169.

“A trial judge should remain vigilant in observing the duty set forth in Idaho Code § 19-2132: ‘In charging the jury, the court must state to them all matters of law necessary for their information.’” SUPREME COURT OF THE STATE OF IDAHO, IDAHO CRIMINAL JURY INSTRUCTIONS, INTRODUCTION AND GENERAL DIRECTIONS FOR USE, *available at* http://www.isc.idaho.gov/idaho_courts_e.htm. *But see State v. Adamcik*, No. 34639, 2011 WL 5923063, *24 (Idaho, Nov. 29, 2011) (noting, “Where the language of the indictment or information goes beyond alleging elements of the crime, it is mere surplusage that need not be proved. However, the inclusion of surplusage must not be allowed to prejudice a defendant in the context of his case” (internal citation omitted)); *State v. Hoffman*, 37 Idaho 897, 901, 55 P.3d 890 (Ct. App. 2002) (“a variance between a charging instrument and a jury instruction necessitates reversal only when it deprives the defendant of his right to fair notice or leaves him open to the risk of double jeopardy.” (internal citation omitted)); *State v. Draper*, 151 Idaho 576, 261 P.3d 853, 866 (2011) (finding trial court did not err for not instructing jury on definitions of willful and deliberate, because the defendant was attempting to insert legal definitions where the common definition [was] the appropriate one).

In this case, the Information charges that Mr. Herrera “...did willfully, unlawfully, deliberately, and with malice aforethought, but without premeditation, kill and murder

Mrs. Larsen...” Accordingly, the terms “willfully, unlawfully, deliberately, and with malice aforethought,” are alleged as elements of the crime in the Information (and *not mere surplusage*) which the state is obligated to prove. As such, Mr. Ellington is entitled to give instructions to the jury regarding the definitions of “willfully,” “unlawfully,” and “deliberately,” in Count I. See, e.g., *State v. Lilly*, which discussed *State v. Young*:

...[T]he Idaho Supreme Court addressed the use of the I.C. § 18–101(1) general definition of “willfully” in the context of the charge of felony injury to a child, I.C. § 18–1501(1). The *Young* Court reached the same conclusion as that reached by this Court in *Sohm*; *that the district court erred in giving the general definition of willfully because it directly conflicted with the use of the term in the substantive statute*.

State v. Lilly, 142 Idaho 70, 73, 122 P.3d 1170 (Ct. App. 2005) (citing *State v. Young*, 138 Idaho 370, 64 P.3d 296 (2002) (emphasis added)). This suggests that terms used in criminal statutes are not always identical to the general definitions used in a dictionary; demonstrating that the court has the authority to give instructions about the definitions of terms used in the context in which the term is used in the substantive statute.

GIVEN _____
REFUSED _____
ACCEPTED _____
MODIFIED _____
COVERED _____
JUDGE _____

given

ICJI 702 MALICE-DEFINED

INSTRUCTION NO. 11A

Malice may be express or implied.

Malice is express when there is manifested a deliberate intention unlawfully to kill a human being.

Malice is implied when:

1. The killing resulted from an intentional act,
2. The natural consequences of the act are dangerous to human life, and
3. The act was deliberately performed with knowledge of the danger to, and with conscious disregard for, human life.

When it is shown that a killing resulted from the intentional doing of an act with express or implied malice, no other mental state need be shown to establish the mental state of malice aforethought. The mental state constituting malice aforethought does not necessarily require any ill will or hatred of the person killed.

The word "aforethought" does not imply deliberation or the lapse of time. It only means that the malice must precede rather than follow the act.

Comment

I.C. § 18-4002.

Do not use this instruction if the only murder charge is felony murder or murder by the intentional application of torture because these crimes do not require proof of malice aforethought. Idaho Code § 18-4001; *State v. Pratt*, 125 Idaho 594, 873 P.2d 848 (1994); *State v. Lankford*, 116 Idaho 860, 781 P.2d 197 (1989).

There is no legal distinction between malice and malice aforethought. *State v. Dunlap*, 125 Idaho 530, 873 P.2d 784 (1993).

When the charge is attempted second degree murder, this instruction must be amended to delete any reference to implied malice. The intent to kill is required for attempted second degree murder. *State v. Buckley*, 131 Idaho 164, 953 P.2d 604 (1998).

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 12A

In order for the defendant to be guilty of Second Degree Murder, the state must prove each of the following:

1. On or about December 25, 2011
2. in the state of Idaho
3. Joseph Herrera engaged in conduct which caused the death of Stefanie Comack,
4. the defendant acted without justification or excuse, and
5. with malice aforethought.

If you find that the state has failed to prove any of the above, you must find the defendant not guilty of second degree murder. If you find that all of the above have been proven beyond a reasonable doubt, then you must find the defendant guilty of second degree murder.

Comment

I.C. § 18-4001, 18-4003.

Comack

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 13

If your unanimous verdict is that Mr. Herrera is not guilty of second degree murder, you must acquit him of that charge. In that event, you must next consider the included offenses of voluntary manslaughter and involuntary manslaughter.

Covered

ICJI 225

Given _____ Refused _____
Modified _____ Covered _____
Other _____
Judge: _____

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 14A

The distinction between murder and manslaughter is that murder requires malice aforethought, while manslaughter does not.

There is no malice aforethought if the defendant acted with adequate provocation while in the heat of passion or a sudden quarrel, even if the defendant intended to kill the deceased. The provocation would have been adequate if it would have caused a reasonable person, in the same circumstances, to lose self-control and act on impulse and without reflection.

Heat of passion may be provoked by fear, rage, anger, terror, revenge or other emotion. Adequate provocation does not exist, however, when a person acts from choice and malice aforethought even though experiencing any number of emotions.

The defendant would not be acting in heat of passion or sudden quarrel if sufficient time elapsed after the provocation for a reasonable person in the same circumstances to have regained self-control and for reason to have returned.

Comment

ICJI-707

covered

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 16A

In order for Mr. Herrera to be found guilty of voluntary manslaughter, the state must prove each of the following beyond a reasonable doubt:

1. On or about December 25, 2011;
2. In the state of Idaho;
3. Joseph Herrera engaged in conduct which caused the death of Stefanie Comack; and
4. Mr. Herrera acted unlawfully upon a sudden quarrel or heat of passion and without malice aforethought in causing such death; and

If any of the above has not been proven beyond a reasonable doubt, then you must find Mr. Herrera not guilty of voluntary manslaughter. If each of the above has

covered

been proven beyond a reasonable doubt, you must find Mr. Herrera guilty of voluntary manslaughter.

I.C. § 18-4006

ICJI 708

Given _____ Refused _____
Modified _____ Covered _____
Other _____
Judge: _____

covered

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 18A

In order for the defendant to be guilty of Involuntary Manslaughter by negligent use of a deadly weapon, the state must prove each of the following:

1. On or about December 25, 2011
2. in the state of Idaho
3. the defendant Joseph Herrera used a firearm with reckless disregard of the consequences and of the rights of others,
4. producing the death of Stefanie Comack.

A "deadly weapon" is any object, instrument or weapon which is used in such a manner as to be capable of producing, and likely to produce, death or great bodily injury.

If any of the above has not been proven beyond a reasonable doubt, you must find the defendant not guilty. If each of the above has been proven beyond a reasonable doubt, then you must find the defendant guilty.

Comment

I.C. § 18-4006(2).

In order for a negligent act to be criminal, it must be more than the failure to exercise ordinary care. The reference to negligence in a criminal statute means such negligence as amounts to a reckless disregard of the consequences and of the rights of others. *State v. Hintz*, 61 Idaho 411, 102 P.2d 639 (1940); *State v. McMahan*, 57 Idaho 240, 65 P.2d 156 (1937); IC § 18-114.

Hands or other body parts or appendages may not, by themselves, constitute deadly weapons under the aggravated assault and aggravated battery statutes. *State v. Townsend*, 124 Idaho 881, 865 P.2d 972 (1993). A boot can be a deadly weapon under IC § 18-905. *State v. Huston*, 121 Idaho 738, 828 P.2d 301 (1992). In general, an instrumentality may be a deadly weapon if it is capable of being used in a deadly manner and the evidence indicates that its possessor intended on that occasion to use it as a weapon. *Townsend*, at 886, 865 P.2d at 977, citing *Huston*, and *State v. Missenberger*, 86 Idaho 321, 386 P.2d 559 (1963). A pocket knife may be a deadly weapon, depending on the

circumstances of its use. *State v. Lenz*, 103 Idaho 632,
651 P.2d 566 (Ct. App. 1982).

STATE OF IDAHO
COUNTY OF KOOTENAI
FILED: 12/19/13
AT 2:55 P.M.
CLERK, DISTRICT COURT
DEPUTY

INSTRUCTION NO. 1

Now that you have been sworn as jurors to try this case, I want to go over with you what will be happening. I will describe how the trial will be conducted and what we will be doing. At the end of the trial, I will give you more detailed guidance on how you are to reach your decision.

Because the state has the burden of proof, it goes first. After the state's opening statement, the defense may make an opening statement, or may wait until the state has presented its case.

The state will offer evidence that it says will support the charge(s) against the defendant. The defense may then present evidence, but is not required to do so. If the defense does present evidence, the state may then present rebuttal evidence. This is evidence offered to answer the defense's evidence.

After you have heard all the evidence, I will give you additional instructions on the law. After you have heard the instructions, the state and the defense will each be given time for closing arguments. In their closing arguments, they will summarize the evidence to help you understand how it relates to the law. Just as the opening statements are not evidence, neither are the closing arguments. After the closing arguments, you will leave the courtroom together to make your decision. During your deliberations, you will have with you my instructions, the exhibits admitted into evidence and any notes taken by you in court.

INSTRUCTION NO 2

Your duties are to determine the facts, to apply the law set forth in my instructions to those facts, and in this way to decide the case. In so doing, you must follow my instructions regardless of your own opinion of what the law is or should be, or what either side may state the law to be. You must consider them as a whole, not picking out one and disregarding others. The order in which the instructions are given has no significance as to their relative importance. The law requires that your decision be made solely upon the evidence before you. Neither sympathy nor prejudice should influence you in your deliberations. Faithful performance by you of these duties is vital to the administration of justice.

In determining the facts, you may consider only the evidence admitted in this trial. This evidence consists of the testimony of the witnesses, the exhibits offered and received, and any stipulated or admitted facts. The production of evidence in court is governed by rules of law. At times during the trial, an objection may be made to a question asked a witness, or to a witness' answer, or to an exhibit. This simply means that I am being asked to decide a particular rule of law. Arguments on the admissibility of evidence are designed to aid the Court and are not to be considered by you nor affect your deliberations. If I sustain an objection to a question or to an exhibit, the witness may not answer the question or the exhibit may not be considered. Do not attempt to guess what the answer might have been or what the exhibit might have shown. Similarly, if I tell you not to consider a particular statement or exhibit you should put it out of your mind, and not refer to it or rely on it in your later deliberations.

During the trial I may have to talk with the parties about the rules of law which should apply in this case. Sometimes we will talk here at the bench. At other times I will excuse you from the courtroom so that you can be comfortable while we work out any problems. You are not to speculate about any such discussions. They are necessary from time to time and help the trial run more smoothly.

Some of you have probably heard the terms "circumstantial evidence," "direct evidence" and "hearsay evidence." Do not be concerned with these terms. You are to consider all the evidence admitted in this trial.

However, the law does not require you to believe all the evidence. As the sole judges of the facts, you must determine what evidence you believe and what weight you attach to it.

There is no magical formula by which one may evaluate testimony. You bring with you to this courtroom all of the experience and background of your lives. In your everyday affairs you determine for yourselves whom you believe, what you believe, and how much weight you attach to what you are told. The same considerations that you use in your everyday dealings in making these decisions are the considerations which you should apply in your deliberations.

In deciding what you believe, do not make your decision simply because more witnesses may have testified one way than the other. Your role is to think about the testimony of each witness you heard and decide how much you believe of what the witness had to say.

A witness who has special knowledge in a particular matter may give an opinion on that matter. In determining the weight to be given such opinion, you should consider the qualifications and credibility of the witness and the reasons given for the opinion. You are not bound by such opinion. Give it the weight, if any, to which you deem it entitled.

INSTRUCTION 3

Joseph Duane Herrera has been charged with the offense of MURDER IN THE SECOND DEGREE as follows: That the said Joseph Duane Herrera on or about the 25th day of December, 2011, at and in the County of Benewah, State of Idaho, he did then and there unlawfully, and with malice aforethought, but without premeditation, kill Stephanie Comack, a human being, by willfully and deliberately pointing a .380 handgun at her head and pulling the trigger, from which she died.

To this charge, the defendant has entered his plea of Not Guilty.

This complaint signifies nothing more than the formal method of accusing Joseph Duane Herrera. It is not evidence of any kind against Joseph Duane Herrera.

INSTRUCTION NO. 4

The filing of a criminal charge against the defendant is a mere accusation against the defendant and does not constitute any evidence of the defendant's guilt. You are not to be prejudiced or influenced to any extent against the defendant because a criminal charge has been made.

INSTRUCTION NO. 5

Under our law and system of justice, the defendant is presumed to be innocent. The presumption of innocence means two things.

First, the state has the burden of proving the defendant guilty. The state has that burden throughout the trial. The defendant is never required to prove innocence, nor does the defendant ever have to produce any evidence at all.

Second, the state must prove the alleged crime beyond a reasonable doubt. A reasonable doubt is not a mere possible or imaginary doubt. It is a doubt based on reason and common sense. It may arise from a careful and impartial consideration of all the evidence, or from lack of evidence. If after considering all the evidence you have a reasonable doubt about the defendant's guilt, you must find the defendant not guilty.

INSTRUCTION NO. 6

If during the trial I may say or do anything which suggests to you that I am inclined to favor the claims or position of any party, you will not permit yourself to be influenced by any such suggestion. I will not express nor intend to express, nor will I intend to intimate, any opinion as to which witnesses are or are not worthy of belief; what facts are or are not established; or what inferences should be drawn from the evidence. If any expression of mine seems to indicate an opinion relating to any of these matters, I instruct you to disregard it.

INSTRUCTION NO. 7

If you wish, you may take notes to help you remember what witnesses said. If you do take notes, please keep them to yourself until you and your fellow jurors go to the jury room to decide the case. You should not let note-taking distract you so that you do not hear other answers by witnesses. When you leave at night, please leave your notes in the jury room.

If you do not take notes, you should rely on your own memory of what was said and not be overly influenced by the notes of other jurors. In addition, you cannot assign to one person the duty of taking notes for all of you.

INSTRUCTION NO. 8

It is important that as jurors and officers of this court you obey the following instructions at any time you leave the jury box, whether it be for recesses of the court during the day or when you leave the courtroom to go home at night.

Do not discuss this case during the trial with anyone, including any of the attorneys, parties, witnesses, your friends, or members of your family. "No discussion" also means no emailing, text messaging, and any other form of communication, electronic or otherwise.

Do not discuss this case with other jurors until you begin your deliberations at the end of the trial. Do not attempt to decide the case until you begin your deliberations.

I will give you some form of this instruction every time we take a break. I do that not to insult you or because I don't think you are paying attention, but because there is a natural temptation for jurors to discuss the case with fellow jurors since sitting as a juror is the one thing you have in common.

There are at least two reasons for this rule. First, we want you keep an open mind during the entire trial. When you talk about things, you start to make decisions about them. It is very important that you not make any decisions about this case until you have heard all the evidence at the end of the trial. Second, we want all of you working together as a group of twelve when you deliberate.

Ignore any attempted improper communication. If any person tries to talk to you about this case, tell that person that you cannot discuss the case because you are a juror. If that person persists, simply walk away and report the incident to the bailiff.

Do not make any independent personal investigations

into any facts or locations connected with this case. Do not look up any information from any source, including the internet. In our daily lives we may be used to looking for information on-line as a matter of routine. You cannot do that with respect to this case.

In a trial it can be very tempting for jurors to do their own research. You must resist that temptation for our system of justice to work as it should. I specifically instruct that you must decide the case only on the evidence received here in court. If you communicate with anyone about the case or do outside research during the trial it could cause us to have to start the trial over with new jurors.

Do not communicate any private or special knowledge about any of the facts of this case to your fellow jurors. Do not read or listen to any news reports about this case, whether those reports are in newspapers or the internet, or on radio or television.

While you are actually deliberating in the jury room, the bailiff will confiscate all cell phones and other means of electronic communications.

INSTRUCTION NO. 9

You have now heard all the evidence in the case. My duty is to instruct you as to the law.

You must follow all the rules as I explain them to you. You may not follow some and ignore others. Even if you disagree or don't understand the reasons for some of the rules, you are bound to follow them. If anyone states a rule of law different from any I tell you, it is my instruction that you must follow.

INSTRUCTION NO. 10

It is alleged that the crime charged was committed "on or about" a certain date. If you find the crime was committed, the proof need not show that it was committed on that precise date.

INSTRUCTION NO. 11

Certain evidence was admitted for a limited purpose. At the time this evidence was admitted you were admonished that it could not be considered by you for any purpose other than the limited purpose for which it was admitted. Do not consider such evidence for any purpose except the limited purpose for which it was admitted.

INSTRUCTION NO. 12

Do not concern yourself with the subject of penalty or punishment. That subject must not in any way affect your verdict. If you find the defendant guilty, it will be my duty to determine the appropriate penalty or punishment.

INSTRUCTION NO. 13

In every crime or public offense there must exist a union, or joint operation of act and intent.

INSTRUCTION NO. 14

You have been instructed as to all the rules of law that may be necessary for you to reach a verdict. Whether some of the instructions will apply will depend upon your determination of the facts. You will disregard any instruction which applies to a state of facts which you determine does not exist. You must not conclude from the fact that an instruction has been given that the Court is expressing any opinion as to the facts.

INSTRUCTION 15

Murder is the killing of a human being without legal justification or excuse and with malice aforethought.

INSTRUCTION 16

In order for the defendant to be guilty of MURDER IN THE SECOND DEGREE, the state must prove each of the following:

1. On or about the 25th day of December, 2011,
2. in the State of Idaho,
3. the defendant, Joseph Duane Herrera, engaged in conduct which caused the death of Stephanie Comack,
4. the defendant acted without justification or excuse, and
5. with malice aforethought.

If you find that the State has failed to prove any of the above, then you must find the defendant not guilty of murder. If you find that all of the above have been proven beyond a reasonable doubt then you must find the defendant guilty of murder.

JURY INSTRUCTION NO. 17

Malice may be express or implied.

Malice is express when there is manifested a deliberate intention unlawfully to kill a human being.

Malice is implied when:

1. The killing resulted from an intentional act,
2. The natural consequences of the act are dangerous to human life, and
3. The act was deliberately performed with knowledge of the danger to, and with conscious disregard for, human life.

When it is shown that a killing resulted from the intentional doing of an act with express or implied malice, no other mental state need be shown to establish the mental state of malice aforethought. The mental state constituting malice aforethought does not necessarily require any ill will or hatred of the person killed.

The word "aforethought" does not imply deliberation or the lapse of time. It only means that the malice must precede rather than follow the act.

INSTRUCTION 18

If your unanimous verdict is that the defendant is not guilty of MURDER IN THE SECOND DEGREE, you must acquit the defendant of that charge. In that event, you must next consider the included offense of VOLUNTARY MANSLAUGHTER.

INSTRUCTION 19

The distinction between murder and manslaughter is that murder requires malice aforethought, while manslaughter does not.

There is no malice aforethought if the defendant acted with adequate provocation while in the heat of passion or a sudden quarrel, even if the defendant intended to kill the deceased. The provocation would have been adequate if it would have caused a reasonable person, in the same circumstances, to lose self-control and act on impulse and without reflection.

Heat of passion may be provoked by fear, rage, anger, terror, revenge or other emotion. Adequate provocation does not exist, however, when a person acts from choice and malice aforethought even though experiencing any number of emotions.

INSTRUCTION 20

In order for the defendant to be guilty of Voluntary Manslaughter, the state must prove each of the following:

1. On or about the 25th day of December, 2011,
2. in the State of Idaho,
3. the defendant, Joseph Duane Herrera, engaged in conduct which caused the death of Stephanie Comack, and
4. the defendant acted unlawfully upon a sudden quarrel or heat of passion and without malice aforethought in causing such death.

If any of the above has not been proven beyond a reasonable doubt, then you must find the defendant not guilty. If each of the above has been proven beyond a reasonable doubt, you must find the defendant guilty of voluntary manslaughter.

INSTRUCTION 21

If your unanimous verdict is that the defendant is not guilty of VOLUNTARY MANSLAUGHTER, you must acquit the defendant of that charge. In that event, you must next consider the included offense of INVOLUNTARY MANSLAUGHTER.

INSTRUCTION 22

In order for the defendant to be guilty of Involuntary Manslaughter by negligent use of a deadly weapon, the state must prove each of the following:

1. On or about the 25th day of December, 2011,
2. in the state of Idaho,
3. the defendant, Joseph Duane Herrera, used a firearm with reckless disregard of the consequences and of the rights of others,
4. producing the death of Stephanie Comack.

A "deadly weapon" is any object, instrument or weapon which is used in such a manner as to be capable of producing, and likely to produce, death or great bodily injury.

If any of the above has not been proven beyond a reasonable doubt, then you must find the defendant not guilty. If each of the above has been proven beyond a reasonable doubt, you must find the defendant guilty.

INSTRUCTION 23

You heard testimony that the defendant, JOSEPH DUANE HERRERA, made a statement to the police concerning the crime charged in this case. You must decide what, if any, statements were made and give them the weight you believe is appropriate, just as you would any other evidence or statements in the case.

INSTRUCTION NO. 24

I have outlined for you the rules of law applicable to this case and have told you of some of the matters which you may consider in weighing the evidence to determine the facts. In a few minutes counsel will present their closing remarks to you, and then you will retire to the jury room for your deliberations.

The arguments and statements of the attorneys are not evidence. If you remember the facts differently from the way the attorneys have stated them, you should base your decision on what you remember.

The attitude and conduct of jurors at the beginning of your deliberations are important. It is rarely productive at the outset for you to make an emphatic expression of your opinion on the case or to state how you intend to vote. When you do that at the beginning, your sense of pride may be aroused, and you may hesitate to change your position even if shown that it is wrong. Remember that you are not partisans or advocates, but are judges. For you, as for me, there can be no triumph except in the ascertainment and declaration of the truth.

As jurors you have a duty to consult with one another and to deliberate before making your individual decisions. You may fully and fairly discuss among yourselves all of the evidence you have seen and heard in this courtroom about this case, together with the law that relates to this case as contained in these instructions.

During your deliberations, you each have a right to re-examine your own views and change your opinion. You should only do so if you are convinced by fair and honest discussion that your original opinion was incorrect based upon the evidence the jury saw and heard during the trial and the law as given you in these instructions.

Consult with one another. Consider each other's views, and deliberate with the objective of reaching an agreement, if you can do so without disturbing your individual judgment. Each of you must decide this case for yourself; but you should do so only after a discussion and consideration of the case with your fellow jurors.

However, none of you should surrender your honest opinion as to the weight or effect of evidence or as to the innocence or guilt of the defendant because the majority of the jury feels otherwise or for the purpose of returning a unanimous verdict.

INSTRUCTION NO. 25

Upon retiring to the jury room, select one of you as a presiding officer, who will preside over your deliberations. It is that person's duty to see that discussion is orderly; that the issues submitted for your decision are fully and fairly discussed; and that every juror has a chance to express himself or herself upon each question.

In this case, your verdict must be unanimous. When you all arrive at a verdict, the presiding officer will sign it and you will return it into open court.

Your verdict in this case cannot be arrived at by chance, by lot, or by compromise.

If, after considering all of the instructions in their entirety, and after having fully discussed the evidence before you, the jury determines that it is necessary to communicate with me, you may send a note by the bailiff. You are not to reveal to me or anyone else how the jury stands until you have reached a verdict or unless you are instructed by me to do so.

A verdict form suitable to any conclusion you may reach will be submitted to you with these instructions.

INSTRUCTION NO. 26

The exhibits will be with you in the jury room. They are part of the official court record. For this reason please do not alter them or mark on them in any way.

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BENEWAH

STATE OF IDAHO,)
)
Plaintiff,)
) Case No. CR11-2053
vs.)
) VERDICT
JOSEPH DUANE HERRERA,)
)
Defendant.)
_____)

We, the jury, duly impaneled and sworn to try the above
entitled action, for our verdict, unanimously answer the
questions submitted to us as follows:

1. Is Joseph Duane Herrera not guilty or guilty of MURDER IN
THE SECOND DEGREE?

NOT GUILTY ()
GUILTY ()

If you unanimously answered Question No. 1 "Guilty," then
you should simply sign the verdict form and advise the bailiff.
If you unanimously answered Question No. 1 "Not Guilty," then
proceed to answer Question No. 2.

2. Is Joseph Duane Herrera not guilty or guilty of VOLUNTARY
MANSLAUGHTER?

NOT GUILTY ()
GUILTY ()

If you unanimously answered Question No. 2 "Guilty," then you should simply sign the verdict form and advise the bailiff.

If you unanimously answered Question No. 2 "Not Guilty," then proceed to answer Question No. 3.

3. Is Joseph Duane Herrera not guilty or guilty of INVOLUNTARY MANSLAUGHTER?

NOT GUILTY ()
GUILTY ()

DATED this _____ day of _____, 2013.

Foreman

FILED
BENEWAH COUNTY

2013 MAR -8 PM 1:48

DOUGLAS PAUL PAYNE #4789
Prosecuting Attorney
Benewah County Courthouse
St. Maries, Idaho 83861
Telephone: 208-245-2564


BY: CJR DEPUTY

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BENEWAH

STATE OF IDAHO,)	
)	
Plaintiff,)	
)	Case No. CR11-2053
vs.)	
)	REQUEST FOR
JOSEPH DUANE HERRERA,)	JURY INSTRUCTIONS
)	
Defendant.)	
_____)	

COMES NOW, DOUGLAS PAUL PAYNE, Prosecuting Attorney for Benewah County, State of Idaho, and respectfully requests that the attached jury instructions be given.

DATED this 8th day of March, 2013.


Douglas Paul Payne
Prosecuting Attorney

INSTRUCTION _____

Joseph Duane Herrera has been charged with the offense of MURDER IN THE SECOND DEGREE as follows: That the said Joseph Duane Herrera on or about the 25th day of December, 2011, at and in the County of Benewah, State of Idaho, he did then and there unlawfully, and with malice aforethought, but without premeditation, kill Stephanie Comack, a human being, by willfully and deliberately pointing a .380 handgun at her head and pulling the trigger, from which she died.

To this charge, the defendant has entered his plea of Not Guilty.

This complaint signifies nothing more than the formal method of accusing Joseph Duane Herrera. It is not evidence of any kind against Joseph Duane Herrera.

GIVEN ✓

REFUSED _____

MODIFIED _____

COVERED _____

OTHER _____

INSTRUCTION _____

Joseph Duane Herrera has been charged with the offense of MURDER IN THE SECOND DEGREE as follows: That the said Joseph Duane Herrera on or about the 25th day of December, 2011, at and in the County of Benewah, State of Idaho, he did then and there willfully, unlawfully, deliberately, and with malice aforethought, but without premeditation, kill and murder Stephanie Comack, a human being, by placing a 380 handgun against her head and pulling the trigger, from which she died.

To this charge, the defendant has entered his plea of Not Guilty.

This complaint signifies nothing more than the formal method of accusing Joseph Duane Herrera. It is not evidence of any kind against Joseph Duane Herrera.

GIVEN _____

REFUSED _____

MODIFIED ☒ _____

COVERED _____

OTHER _____

INSTRUCTION _____

Murder is the killing of a human being without legal justification or excuse and with malice aforethought.

GIVEN ✓

REFUSED _____

MODIFIED _____

COVERED _____

OTHER _____

INSTRUCTION_____

In order for the defendant to be guilty of MURDER IN THE SECOND DEGREE, the state must prove each of the following:

1. On or about the 25th day of December, 2011,
2. in the State of Idaho,
3. the defendant, Joseph Duane Herrera, engaged in conduct which caused the death of Stephanie Comack,
4. the defendant acted without justification or excuse, and
5. with malice aforethought.

If you find that the State has failed to prove any of the above, then you must find the defendant not guilty of murder. If you find that all of the above have been proven beyond a reasonable doubt then you must find the defendant guilty of murder.

GIVEN _____ ✓

REFUSED _____

MODIFIED _____

COVERED _____

OTHER _____

INSTRUCTION _____

Malice may be express or implied.

Malice is express when there in manifested a deliberate intention unlawfully to kill a human being.

Malice is implied when:

1. The killing resulted from an intentional act,
2. The natural consequences of the act are dangerous to human life, and
3. The act was deliberately performed with knowledge of the danger to, and with conscious disregard for, human life.

When it is shown that a killing resulted from the intentional doing of an act with express or implied malice, no other mental state need be shown to establish the mental state of malice aforethought. The mental state constituting malice aforethought does not necessarily require any ill will or hatred of the person killed.

State v. Porter 123 P3d 908 @912

GIVEN _____

REFUSED ✓

MODIFIED _____

COVERED ✓ by def. 11(a) 1CJ1 702

OTHER _____

INSTRUCTION_____

Malice may be express or implied. It is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow human being. It is implied when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart.

GIVEN_____

REFUSED ☒_____

MODIFIED_____

COVERED ☒_____

OTHER_____

INSTRUCTION _____

Murder is the unlawful killing of a human being with malice aforethought. The element of malice may be presumed when a defendant uses a deadly weapon against the person of another in a deadly manner.

State v. Jaco, 130 Idaho 870

GIVEN _____

REFUSED ☒ _____

MODIFIED _____

COVERED _____

OTHER _____

INSTRUCTION _____

The distinction between murder and manslaughter is that murder requires malice aforethought, while manslaughter does not.

There is no malice aforethought if the defendant acted with adequate provocation while in the heat of passion or a sudden quarrel, even if the defendant intended to kill the deceased. The provocation would have been adequate if it would have caused a reasonable person, in the same circumstances, to lose self-control and act on impulse and without reflection.

Heat of passion may be provoked by fear, rage, anger, terror, revenge or other emotion. Adequate provocation does not exist, however, when a person acts from choice and malice aforethought even though experiencing any number of emotions.

GIVEN ☒ _____

REFUSED _____

MODIFIED _____

COVERED _____

OTHER _____

INSTRUCTION_____

You heard testimony that the defendant, JOSEPH DUANE HERRERA, made a statement to the police concerning the crime charged in this case. You must decide what, if any, statements were made and give them the weight you believe is appropriate, just as you would any other evidence or statements in the case.

GIVEN_____✓

REFUSED_____

MODIFIED_____

COVERED_____

OTHER_____

INSTRUCTION_____

If your unanimous verdict is that the defendant is not guilty of MURDER IN THE SECOND DEGREE, you must acquit the defendant of that charge. In that event, you must next consider the included offense of VOLUNTARY MANSLAUGHTER.

GIVEN ✓

REFUSED _____

MODIFIED _____

COVERED _____

OTHER _____

INSTRUCTION _____

In order for the defendant to be guilty of Voluntary Manslaughter, the state must prove each of the following:

1. On or about the 25th day of December, 2011,
2. in the State of Idaho,
3. the defendant, Joseph Duane Herrera, engaged in conduct which caused the death of Stephanie Comack, and
4. the defendant acted unlawfully upon a sudden quarrel or heat of passion and without malice aforethought in causing such death.

If any of the above has not been proven beyond a reasonable doubt, then you must find the defendant not guilty. If each of the above has been proven beyond a reasonable doubt, you must find the defendant guilty of voluntary manslaughter.

GIVEN ✓

REFUSED _____

MODIFIED _____

COVERED _____

OTHER _____

INSTRUCTION _____

If your unanimous verdict is that the defendant is not guilty of VOLUNTARY MANSLAUGHTER, you must acquit the defendant of that charge. In that event, you must next consider the included offense of INVOLUNTARY MANSLAUGHTER.

GIVEN ✓

REFUSED _____

MODIFIED _____

COVERED _____

OTHER _____

INSTRUCTION _____

In order for the defendant to be guilty of Involuntary Manslaughter by negligent use of a deadly weapon, the state must prove each of the following:

1. On or about the 25th day of December, 2011,
2. in the state of Idaho,
3. the defendant, Joseph Duane Herrera, used a firearm with reckless disregard of the consequences and of the rights of others,
4. producing the death of Stephanie Comack.

A "deadly weapon" is any object, instrument or weapon which is used in such a manner as to be capable of producing, and likely to produce, death or great bodily injury.

If any of the above has not been proven beyond a reasonable doubt, then you must find the defendant not guilty. If each of the above has been proven beyond a reasonable doubt, you must find the defendant guilty.

GIVEN ✓

REFUSED _____

MODIFIED _____

COVERED _____

OTHER _____

INSTRUCTION_____

You have been instructed as to all the rules of law that may be necessary for you to reach a verdict. Whether some of the instructions apply will depend upon your determination of the facts. You will disregard any instruction which applies to a state of facts which you determine does not exist. You must not conclude from the fact that an instruction has been given that the Court is expressing any opinion as to the facts.

GIVEN ☒ _____

REFUSED _____

MODIFIED _____

COVERED _____

OTHER _____

FILED
BENEWAH COUNTY

2013 MAR -5 PM 4:38

BY: CR .DEPUTY

SIEBE LAW OFFICES, PLLC
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IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BENEWAH

STATE OF IDAHO,

Plaintiff,

vs.

JOSEPH D. HERRERA,

Defendant.

Case No. CR-2011-2053

DEFENDANT'S PROPOSED
JURY INSTRUCTIONS

COMES NOW the defendant, by and through his attorney of record, and
presents to the Court the enclosed jury instructions for consideration for use at trial.

DATED this 5 day of March, 2013.

SIEBE LAW OFFICES, PLLC


JAMES E. SIEBE
Attorney for Defendant

CERTIFICATE OF SERVICE

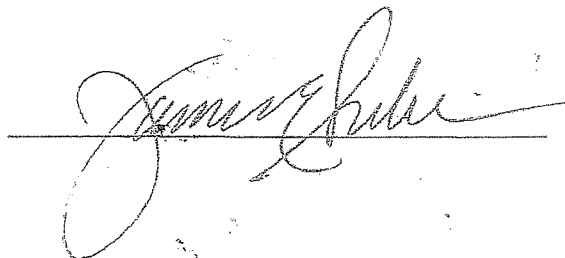
I hereby certify that on the 5 day of March, 2013, I served a true and correct copy of the foregoing document by the method indicated and addressed to the following:

Honorable Judge Gibler
700 Bank Street
P.O. Box 527
Wallace, ID 83873

() U.S. Mail
() Hand Delivered
() Overnight Mail
(☒) Facsimile to: (208) 753-3581

Benewah County Prosecutor
701 College St.
St. Maries, ID 83861

() U.S. Mail
() Hand Delivered
() Overnight Mail
(☒) Facsimile to: (208) 245-1915

A handwritten signature in dark ink, appearing to read "James E. Gibler", is written over a horizontal line.

DEFENDANT'S PROPOSED INSTRUCTION NO. 1

This is the case of State of Idaho v. Joseph Duane. Herrera. Are the parties ready to proceed?

In a moment the Clerk will call the roll of the jury. When your name is called you will also be identified with a number. Please remember your number as we will be using it later in the jury selection process.

The Clerk will now call the roll of the jury.

Ladies and Gentlemen, you have been summoned as prospective jurors in the lawsuit now before us. The first thing we do in a trial is to select 12 jurors and perhaps, one or two alternate jurors from among you.

I am Fred Gibler, the judge in charge of the courtroom and this trial. The deputy clerk of court, _____, marks the trial exhibits and administers oaths to you jurors and to the witnesses. The bailiff, _____, will assist me in maintaining courtroom order and working with the jury.

Each of you is qualified to serve as a juror of this court. This call upon your time does not frequently come to you, but is part of your obligation for your citizenship in this state and country. No one should avoid fulfilling this obligation except under the most pressing circumstances. Service on a jury is a civic and patriotic obligation which all good citizens should perform.

To assist you with the process of selection of a jury, I will introduce you to the

parties and their lawyers and tell you in summary what this action is about. When I introduce an individual would you please stand and briefly face the jury panel and then retake your seat.

The State of Idaho is the plaintiff in this action. The lawyer representing the state is Douglas P. Payne, the Benewah County Prosecutor.

The defendant in this action is Joseph Duane Herrera. The lawyer representing Mr. Herrera is James Siebe.

I will now read you the pertinent portion of the information which sets forth the charge against Mr. Herrera. The information is not to be considered as evidence but is a mere formal charge against Mr. Herrera. You must not consider it as evidence of his guilt and you must not be influenced by the fact that a charge has been filed.

The information charges:

"that the said Joseph Duane Herrera, on or about the 25th day of December, 2011, in the County of Benewah, State of Idaho, did willfully, unlawfully, deliberately, and with malice aforethought, but without premeditation, kill and murder Stephanie Comack, a human being, by placing a .380 handgun against her head and pulling the trigger, from which she died.

Mr. Herrera has pled not guilty to these charges. Under our law and system of justice, Mr. Herrera is presumed to be innocent. The effect of this presumption is to

require the state to prove his guilt beyond a reasonable doubt in order to support a conviction against him.

As the judge in charge of this courtroom, it is my duty, at various times during the course of this trial, to instruct you as to the law that applies to this case.

The duty of the jury is to determine the facts; to apply the law set forth in the instructions to those facts, and in this way to decide the case. In applying the Court's instructions as to the controlling law, you must follow those instructions regardless of your opinion of what the law is or what the law should be, or what any lawyer may state the law to be.

During the course of this trial, including the jury selection process, you are instructed that you are not to discuss this case among yourselves or with anyone else, nor to form any opinion as to the merits of the case until after the case has been submitted to you for your determination.

We will now call an initial selection of _____ jurors. As your name is called, please take a seat as directed by the bailiff. The clerk will please draw the initial jurors' names.

**** The clerk calls the jurors ****

In this part of the jury selection, you will be asked questions touching on your qualifications to serve as jurors in this particular case. This part of the case is known as the voir dire examination.

Voir dire examination is for the purpose of determining if your decision in this case would in any way be influenced by opinions which you now hold or by some personal experience or special knowledge which you may have concerning the subject matter to be tried. The object is to obtain twelve persons who will impartially try the issues of this case upon the evidence presented in this courtroom without being influenced by any other factors.

Please understand that this questioning is not for the purpose of prying into your affairs for personal reasons but is only for the purpose of obtaining an impartial jury.

Each question has an important bearing upon your qualifications as a juror and each question is based upon a requirement of the law with respect to such qualifications. Each question is asked each of you, as though each of you were being questioned separately.

If your answer to any question is yes, please raise your hand. You will then be asked to identify yourself both by name and juror number.

At this time I would instruct both sides to avoid repeating any question during this voir dire process which has already been asked. I would ask counsel to note, however, that you certainly have the right to ask follow-up questions of any individual juror based upon that juror's response to any previous question.

The jury should be aware that during and following the voir dire examination one or more of you may be challenged.

Each side has a certain number of "peremptory challenges," by which I mean each side can challenge a juror and ask that he or she be excused without giving a reason therefore. In addition each side has challenges "for cause," by which I mean that each side can ask that a juror be excused for a specific reason. If you are excused by either side please do not feel offended or feel that your honesty or integrity is being questioned. It is not.

The clerk will now swear the entire jury panel for the voir dire examination.

IDAHO CRIMINAL JURY INSTRUCTION ("ICJI") 001 (MODIFIED)

Given _____ Refused _____
Modified _____ Covered _____
Other _____
Judge: _____

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 2

During the course of this trial, including the jury selection process, you are instructed that you are not to discuss this case among yourselves or with anyone else, nor to form an opinion as to the merits of the case until after the case has been submitted to you for your determination.

ICJI 002

I.C. § 19-2127

Given _____ Refused _____
Modified _____ Covered _____
Other _____
Judge: _____

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 3

Now that you have been sworn as jurors to try this case, I want to go over with you what will be happening. I will describe how the trial will be conducted and what we will be doing. At the end of the trial I will give you more detailed guidance on how you are to reach your decision.

Because the state has the burden of proof, it goes first. After the state's opening statement, the defense may make an opening statement, or may wait until the state has presented its case.

The state will offer evidence that it says will support the charge against Mr. Herrera. The defense may then present evidence, but is not required to do so. If the defense does present evidence, the state may then present rebuttal evidence. This is evidence offered to answer the defense's evidence.

After you have heard all the evidence, I will give you additional instructions on the law. After you have heard the instructions, the state and the defense will each be given time for closing arguments. In their closing arguments, they will summarize the evidence to help you understand how it relates to the law. Just as the opening statements are not evidence, neither are the closing arguments. After the closing arguments, you will leave the courtroom together to make your decision.

During your deliberations, you will have with you my instructions, the exhibits
admitted into evidence and any notes taken by you in court.

ICJI 101

Given _____ Refused _____
Modified _____ Covered _____
Other _____
Judge: _____

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 3

It is important that as jurors and officers of this court you obey the following instructions at any time you leave the jury box, whether it be for recesses of the court during the day or when you leave the courtroom to go home at night.

First, do not talk about this case either among yourselves or with anyone else during the course of the trial. In fairness to Mr. Herrera and to the state of Idaho, you should keep an open mind throughout the trial and not form or express an opinion about the case. You should only reach your decision after you have heard all the evidence, after you have heard my final instruction and after the final arguments. You may discuss this case with the other members of the jury only after it is submitted to you for your decision. All such discussion should take place in the jury room.

Second, do not let any person talk about this case in your presence. If anyone does talk about it, tell them you are a juror on the case. If they won't stop talking, report that to the bailiff as soon as you are able to do so. You should not tell any of your fellow jurors about what has happened.

Third, during this trial do not talk with any of the parties, their lawyers or any witnesses. By this, I mean not only do not talk about the case, but do not talk at all, even to pass the time of day. In no other way can all parties be assured of the fairness they are entitled to expect from you as jurors.

Fourth, during this trial do not make any investigation of this case or inquiry

outside of the courtroom on your own. Do not go to any place mentioned in the testimony without an explicit order from me to do so. You must not consult any books, dictionaries, encyclopedias or any other source of information unless I specifically authorize you to do so.

Fifth, you must base your verdict solely on what is presented in court and not upon any internet, newspaper, radio, television or other account of what may have happened.

ICJI 108 (MODIFIED)

Given _____ Refused _____
Modified _____ Covered _____
Other _____
Judge: _____

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 4

Your duties are to determine the facts, to apply the law set forth in my instructions to those facts, and in this way to decide the case. In so doing, you must follow my instructions regardless of your own opinion of what the law is or should be, or what either side may state the law to be. You must consider them as a whole, not picking out one and disregarding others. The order in which the instructions are given has no significance as to their relative importance. The law requires that your decision be made solely upon the evidence before you. Neither sympathy nor prejudice should influence you in your deliberations. Faithful performance by you of these duties is vital to the administration of justice.

In determining the facts, you may consider only the evidence admitted in this trial. This evidence consists of the testimony of the witnesses, the exhibits offered and received, and any stipulated or admitted facts. The production of evidence in court is governed by rules of law. At times during the trial, an objection may be made to a question asked a witness, or to a witness's answer, or to an exhibit. This simply means that I am being asked to decide a particular rule of law. Arguments on the admissibility of evidence are designed to aid the Court and are not to be considered by you nor affect your deliberations. If I sustain an objection to a question or to an exhibit, the witness may not answer the question or the exhibit may not be considered. Do not attempt to guess what the answer might have been or what the exhibit might

have shown. Similarly, if I tell you not to consider a particular statement or exhibit you should put it out of your mind, and not refer to it or rely on it in your later deliberations.

During the trial I may have to talk with the parties about the rules of law which should apply in this case. Sometimes we will talk here at the bench. At other times I will excuse you from the courtroom so that you can be comfortable while we work out any problems. You are not to speculate about any such discussions. They are necessary from time to time and help the trial run more smoothly.

Some of you have probably heard the terms "circumstantial evidence," "direct evidence" and "hearsay evidence." Do not be concerned with these terms. You are to consider all the evidence admitted in this trial.

However, the law does not require you to believe all the evidence. As the sole judges of the facts, you must determine what evidence you believe and what weight you attach to it.

There is no magical formula by which one may evaluate testimony. You bring with you to this courtroom all of the experience and background of your lives. In your everyday affairs you determine for yourselves whom you believe, what you believe, and how much weight you attach to what you are told. The same considerations that you use in your everyday dealings in making these decisions are the considerations which you should apply in your deliberations.

In deciding what you believe, do not make your decision simply because more witnesses may have testified one way than the other. Your job is to think about the testimony of each witness you heard and decide how much you believe of what he or she had to say.

A witness who has special knowledge in a particular matter may give his or her opinion on that matter. In determining the weight to be given such opinion, you should consider the qualifications and credibility of the witness and the reasons given for his or her opinion. You are not bound by such opinion. Give it the weight, if any, to which you deem it entitled.

ICJI 104

Given _____ Refused _____
Modified _____ Covered _____
Other _____
Judge: _____

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 5

If during the trial I say or do anything which suggests to you that I am inclined to favor the claims or position of any party, you will not permit yourself to be influenced by any such suggestion. I will not express nor intend to express, nor will I intend to intimate, any opinion as to which witnesses are or are not worthy of belief; what facts are or are not established; or what inferences should be drawn from the evidence. If any expression of mine seems to indicate an opinion relating to any of these matters, I instruct you to disregard it.

ICJI 105

Given _____ Refused _____
Modified _____ Covered _____
Other _____
Judge: _____

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 6

Under our law and system of justice, Mr. Herrera is presumed to be innocent.

The presumption of innocence means two things.

First, the state has the burden of proving Mr. Herrera guilty. The state has that burden throughout the trial. Thus Mr. Herrera, although accused, begins the trial with a clean slate with no evidence against him. He is never required to prove his innocence, nor does he ever have to produce any evidence at all.

Second, the state must prove the alleged crime beyond a reasonable doubt. Mr. Herrera is presumed to be innocent. This presumption places upon the state the burden of proving him guilty beyond a reasonable doubt. If, after considering all the evidence and my instructions on the law, you have a reasonable doubt as to Mr. Herrera's guilt, you must return a verdict of not guilty.

A reasonable doubt is a doubt based on reason and common sense. It is the kind of doubt which would make an ordinary person hesitant to act in the most

important affairs of his or her own life. If after considering all the evidence you have a reasonable doubt about Mr. Herrera's guilt, you must find him not guilty.

ICJI 103 and 103a (MODIFIED)

Taylor v. Kentucky, 436 U.S. 478 (1977); Holland v. United States, 348 U.S. 121, 75 S.Ct. 127, 99 L.Ed. 150 (1954); State v. Taylor, 76 Idaho 358, 362, 283 P.2d 582, 585 (1955).

Given _____ Refused _____
Modified _____ Covered _____
Other _____
Judge: _____

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 7

In every crime or public offense there must exist a union or joint operation of act
and intent.

I.C. § 18-114

ICJI 305

Given _____ Refused _____
Modified _____ Covered _____
Other _____
Judge: _____

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 8

Certain evidence was admitted for a limited purpose.

At the time this evidence was admitted you were admonished that it could not be considered by you for any purpose other than the limited purpose for which it was admitted.

Do not consider such evidence for any purpose except the limited purpose for which it was admitted.

ICJI 308

Given _____ Refused _____
Modified _____ Covered _____
Other _____
Judge: _____

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 9

You, the jurors, are the exclusive judges of the credibility of the witnesses, and it is your duty to reconcile any conflict that may appear in the testimony, as far as may be in your power, upon the theory that each witness has sworn to tell the truth.

If you believe that a witness, or any number of witnesses, have willfully and knowingly testified falsely, in regard to any material matter, you may disregard such witness's testimony, except in so far as it is corroborated by other credible evidence or by facts or circumstances appearing in the case.

In determining the credibility of any witness you may consider any matter that has a tendency in reason to prove or disprove the truthfulness of any witness's testimony, including but not limited to the following:

The witness's demeanor while testifying and the manner in which the witness testifies;

Character of the testimony;

The extent of the witness's capacity to perceive, to recollect, or to communicate any matter about which is testified to;

Extent of the witness's opportunity to perceive any matter about which is testified to;

The witness's character for honesty or veracity or their opposites;

The existence or nonexistence of bias, interest, or other motive;

A statement previously made by the witness that is consistent with that witness's testimony;

A statement previously made by the witness that is inconsistent with that witness's testimony;

The existence or nonexistence of any fact testified to by the witness;

The witness's attitude toward the action in which is being testified about or toward the giving of the testimony;

Any witness's admission of untruthfulness;

Any witness's prior conviction of a felony.

State v. Holm, 478 P.2d 284 (Idaho 1970); State v. McPherson, 291 P. 313 (Idaho 1930). California Criminal Jury Instruction 2.20

Given _____ Refused _____
Modified _____ Covered _____
Other _____
Judge: _____

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 10

Second degree murder is the killing of a human being without legal justification or excuse and with malice aforethought.

The killing of a human being is legally justified when done in defense of self, another, or property. You will be instructed on the elements of legal justification in a later instruction.

ICJI 701 (MODIFIED)

State v. Porter, 128 P.3d 908 (Idaho 2005).

I.C. §§ 18-4001, 18-4009

Given _____ Refused _____
Modified _____ Covered _____
Other _____
Judge: _____

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 11

Malice may be express or implied.

Malice is express when there is manifested a deliberate intention to unlawfully
kill a human being.

Malice is implied when:

1. The killing resulted from an intentional act,
2. The natural consequences of the act are dangerous to human life, and
3. The act was performed without considerable provocation, and
4. The defendant acted with an abandoned and malignant heart.

Acting with an abandoned and malignant heart means that the defendant's actions were performed with a reckless disregard for life where any reasonable man would realize his actions to be both unjustifiable and pose a very high risk of death or serious bodily injury.

The word aforethought does not imply deliberation or the lapse of time. It only

means that the malice must precede rather than follow the act.

I.C. §18-4002

ICJI 703 (MODIFIED)

State v. Porter, 128 P.3d 908 (Idaho 2005); United States v. Paul, 37 F.3d 496 (9th Cir. 1994); Fenstermaker v. State, 912 P.2d 653 (Idaho App. 1995) *overruled on other grounds by Porter, supra*.

Given _____ Refused _____
Modified _____ Covered _____
Other _____
Judge: _____

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 12

In order for Mr. Herrera to be guilty of second degree murder, the state must prove each of the following beyond a reasonable doubt:

1. On or about December 25, 2011;
2. In the state of Idaho;
3. Joseph Herrera killed Stephanie Comack;
4. Mr. Herrera acted without justification or excuse; and
5. Mr. Herrera acted with malice aforethought.

If any of the above has not been proven beyond a reasonable doubt, then you must find Mr. Herrera not guilty of second degree murder. If you find that all of the above have been proven beyond a reasonable doubt, you must find Mr. Herrera guilty.

ICJI 704 (MODIFIED)

I.C. § 18-4001; State v. Porter, 128 P.3d 908 (Idaho 2005)

Given _____ Refused _____
Modified _____ Covered _____
Other _____
Judge: _____

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 13

If your unanimous verdict is that Mr. Herrera is not guilty of second degree murder, you must acquit him of that charge. In that event, you must next consider the included offenses of voluntary manslaughter and involuntary manslaughter.

ICJI 225

Given _____ Refused _____
Modified _____ Covered _____
Other _____
Judge: _____

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 14

The distinction between murder and manslaughter is that murder requires malice aforethought, while manslaughter does not.

There is no malice aforethought if the defendant acted with adequate provocation, or in the heat of passion, or upon a sudden quarrel, even if the defendant intended to kill the deceased. The provocation is adequate if it would have caused a reasonable person, in the same circumstances, to lose self control and act on impulse and without reflection.

Heat of passion may be provoked by fear, rage, anger, terror, revenge or other emotion. Adequate provocation does not exist, however, when a person acts from choice and malice aforethought even though experiencing any number of emotions.

State v. Porter, 2005 WL 14089 (Idaho App.)(court of appeals case for porter, substantially affirmed by ISC in State v. Porter, 128 P.3d 908 (Idaho 2005)).

ICJI 707

Given _____ Refused _____
Modified _____ Covered _____
Other _____
Judge: _____

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 15

Voluntary Manslaughter occurs in two situations:

1. A defendant, acting with adequate provocation, or upon a sudden quarrel, or in the heat of passion, unintentionally kills another human being and the actions show a conscious disregard for human life by knowingly endangering the life of another; or
2. The defendant kills another human being intentionally but any malice is mitigated by the existence of adequate provocation, or the defendant acting upon a sudden quarrel, or in the heat of passion.

State v. Porter, 128 P.3d 908 (Idaho 2005); State v. Porter, 2005 WL 14089 (Idaho App.); California v. Lasko, 999 P.2d 666 (Cal. 2000).

ICJI 708 (MODIFIED)

Given _____ Refused _____
Modified _____ Covered _____
Other _____
Judge: _____

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 16

In order for Mr. Herrera to be found guilty of voluntary manslaughter, the state must prove each of the following beyond a reasonable doubt:

1. On or about December 25, 2011;
2. In the state of Idaho;
3. Joseph Herrera engaged in conduct which caused the death of Stephanie Comack; and
4. Mr. Herrera acted unlawfully upon a sudden quarrel or heat of passion and without malice aforethought in causing such death; and
- 5a. Mr. Herrera intentionally killed Stephanie Comack; or
- 5b. Mr. Herrera unintentionally killed Stephanie Comack but acted with conscious disregard for human life and knew that his actions could kill Stephanie Comack; and
6. Mr. Herrera acted without justification or excuse.

If any of the above has not been proven beyond a reasonable doubt, then you must find Mr. Herrera not guilty of voluntary manslaughter. If each of the above has

been proven beyond a reasonable doubt, you must find Mr. Herrera guilty of
voluntary manslaughter.

California v. Lasko, 999 P.2d 666 (Cal 2000); State v. Porter, 128 P.3d 909 (Idaho
2005).

I.C. § 18-4006

ICJI 708 (MODIFIED)

Given _____ Refused _____
Modified _____ Covered _____
Other _____
Judge: _____

150

DEFENDANT'S PROPOSED JURY INSTRUCTION NO.17

Involuntary manslaughter is the unintentional and unlawful killing of another human being.

I.C. § 18-4006 (2)

State v. Porter, 128 P.3d 909 (Idaho 2005)

ICJI 711 (MODIFIED)

Given _____ Refused _____

Modified _____ Covered _____

Other _____

Judge: _____

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 18

In order for Mr. Herrera to be guilty of involuntary manslaughter, the state must prove each of the following beyond a reasonable doubt:

1. On or about December 25, 2011;
2. In the state of Idaho;
3. Joseph Herrera unlawfully and unintentionally killed Stephanie Comack, and
4. Mr. Herrera used a deadly weapon (a gun) that caused the killing, and
5. Mr. Herrera acted in a manner that was reckless, but such recklessness did not rise to the reckless disregard for human life found in malice.

If any of the above has not been proven beyond a reasonable doubt, then you must find Mr. Herrera not guilty of involuntary manslaughter. If each of the above has been proven beyond a reasonable doubt, you must find him guilty.

I.C. § 18-4006 (2)

See State v. Porter, 128 P.3d 908 (Idaho 2005).

ICJI 712 (modified).

Given _____ Refused _____
Modified _____ Covered _____
Other _____
Judge: _____

DEFENDANT'S PROPOSED JURY INSTRUCTION NO.19

Murder differs from involuntary manslaughter in two respects:

1. Murder requires malice aforethought; and
2. The defendant's awareness of risk for involuntary manslaughter is short of the extreme disregard for human life, or malice, found in murder.

United States v. Dixon, 419 F.2d 2888 (D.C. Cir. 1996)(concurring opinion); United States v. One Star, 979 F.2d 1319 (8th Cir. 1992); See also United States v. Cox, 509 F.2d 390 (D.C. Cir. 1974).

Given _____ Refused _____
Modified _____ Covered _____
Other _____
Judge: _____

DEFENDANT'S PROPOSED JURY INSTRUCTION NO.20

The State is required to prove beyond a reasonable doubt that Mr. Herrera's actions were the proximate cause of death of Stephanie Comack.

To show proximate cause, the State must prove that Mr. Herrera's actions solely were responsible for the death of Stephanie Comack.

A proximate cause is one which played a substantial part in bringing about the death, so that death was the direct result or a reasonably probable consequence of the defendant's act.

State v. Johnson, 894 P.2d 125 (Idaho 1995)(whether defendant's action proximately cause injury was appropriate for jury instruction where evidence was presented that questioned the reason for the injury); State v. Tiffany, 88 P.3d 728 (Idaho 2004)(no evidence was presented to show any other excuse for cause of death, therefore, instruction was not allowed).

Ninth Circuit Model CJI 8.92.

Given _____ Refused _____
Modified _____ Covered _____
Other _____
Judge: _____

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 21

You have been instructed as to all the rules of law that may be necessary for you to reach a verdict. Whether some of the instructions will apply will depend upon your determination of the facts. You will disregard any instruction which applies to a state of facts which you determine does not exist. You must not conclude from the fact that an instruction has been given that the Court is expressing any opinion as to the facts.

ICJI 205

Given _____ Refused _____
Modified _____ Covered _____
Other _____
Judge: _____

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 22

The original instructions and the exhibits will be with you in the jury room. They are part of the official court record. For this reason please do not alter them or mark on them in any way.

The instructions are numbered for convenience in referring to specific instructions. There may or may not be a gap in the numbering of the instructions. If there is, you should not concern yourselves about such gap.

ICJI 206

Given _____ Refused _____
Modified _____ Covered _____
Other _____
Judge: _____

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 23

Upon retiring to the jury room, select one of you as a presiding officer, who will preside over your deliberations. It is that person's duty to see that discussion is orderly; that the issues submitted for your decision are fully and fairly discussed; and that every juror has a chance to express himself or herself upon each question.

In this case, your verdict must be unanimous. When you all arrive at a verdict, the presiding officer will sign it and you will return it into open court.

Your verdict in this case cannot be arrived at by chance, by lot, or by compromise.

If, after considering all of the instructions in their entirety, and after having fully discussed the evidence before you, the jury determines that it is necessary to communicate with me, you may send a note by the bailiff. You are not to reveal to me or anyone else how the jury stands until you have reached a verdict or unless you are instructed by me to do so.

A verdict form suitable to any conclusion you may reach will be submitted to you with these instructions.

ICJI 207

Given _____ Refused _____
Modified _____ Covered _____
Other _____
Judge: _____

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 24

I have outlined for you the rules of law applicable to this case and have told you of some of the matters which you may consider in weighing the evidence to determine the facts. In a few minutes counsel will present their closing remarks to you, and then you will retire to the jury room for your deliberations.

The arguments and statements of the attorneys are not evidence. If you remember the facts differently from the way the attorneys have stated them, you should base your decision on what you remember.

The attitude and conduct of jurors at the beginning of your deliberations are important. It is rarely productive at the outset for you to make an emphatic expression of your opinion on the case or to state how you intend to vote. When you do that at the beginning, your sense of pride may be aroused, and you may hesitate to change your position even if shown that it is wrong. Remember that you are not partisans or advocates, but are judges. For you, as for me, there can be no triumph except in the ascertainment and declaration of the truth.

As jurors you have a duty to consult with one another and to deliberate before making your individual decisions. You may fully and fairly discuss among yourselves all of the evidence you have seen and heard in this courtroom about this case, together with the law that relates to this case as contained in these instructions.

During your deliberations, you each have a right to re-examine your own views

and change your opinion. You should only do so if you are convinced by fair and honest discussion that your original opinion was incorrect based upon the evidence the jury saw and heard during the trial and the law as given you in these instructions.

Consult with one another. Consider each other's views, and deliberate with the objective of reaching an agreement, if you can do so without disturbing your individual judgment. Each of you must decide this case for yourself; but you should do so only after a discussion and consideration of the case with your fellow jurors.

However, none of you should surrender your honest opinion as to the weight or effect of evidence or as to the innocence or guilt of the defendant because the majority of the jury feels otherwise or for the purpose of returning a unanimous verdict.

ICJI 204

Given _____ Refused _____
Modified _____ Covered _____
Other _____
Judge: _____

DEFENDANT'S PROPOSED VERDICT FORM

With respect to the charge of second degree murder, we, the Jury, unanimously find the Defendant Joseph Herrera:

_____ Not Guilty

_____ Guilty

With respect to the included charge of voluntary manslaughter, we, the Jury, unanimously find the Defendant Joseph Herrera:

_____ Not Guilty

_____ Guilty

With respect to the included charge of involuntary manslaughter, we, the Jury, unanimously find the Defendant Joseph Herrera:

_____ Not Guilty

_____ Guilty

Dated this _____ day of _____, 2013.

Presiding Juror

ICJI 220 (MODIFIED)

ICJI 705 (AMENDED) SECOND DEGREE MURDER

DEFENDANT'S REQUESTED
INSTRUCTION NO: 25

Before you may find Mr. Herrera guilty of Murder in the Second Degree as charged in Count I, the State must prove to you that Mr. Herrera willfully, unlawfully and deliberately caused the death of Stephanie Comack.

Deliberately, as charged by the State in Count I of the Information is defined as:

an intent to kill executed in a cool state of blood, not in sudden passion engendered by lawful or some just cause or provocation;
done with reflection;
a dispassionate weighing process and consideration of consequences before acting.

Unlawfully, as charged by the State in Count I of the Information, is defined as acting without legal justification or excuse.

Willfully, as charged by the State in Count I of the Information, means a purpose or willingness to commit the act charged in the Information.

Comment

The Idaho Supreme Court has recognized that jury instructions should mirror the allegations in the charging document:

In particular, the instructions should be tailored to fit the allegations in the complaint, information or indictment. Failure to do so may cause a fatal variance between the instructions and the charging document, which could deprive the defendant of the right to fair notice of the charges or leave the defendant open to the risk of double jeopardy. See, *State v. Tiffany*, 139 Idaho 909, 918-19, 88 P.3d 737-38 (2004); *State v. Windsor*, 110 Idaho 410, 417-18, 716 P.2d 1182, 1189-90 (1985). A statute will often provide that a particular crime can be committed in different ways. The jury should be instructed only on the particular manner of committing the crime that is alleged in the charging document. In addition, the instructions should not allow the jury to convict a defendant on the basis

of acts or injuries other than those alleged in the charging document.

SUPREME COURT OF THE STATE OF IDAHO, IDAHO CRIMINAL JURY INSTRUCTIONS, INTRODUCTION AND GENERAL DIRECTIONS FOR USE, *available at* http://www.isc.idaho.gov/idaho_courts_e.htm.

Jury instructions must "include every element of the charged offense that the State is obligated to prove." *State v. Halbesleben*, 139 Idaho 165, 169, 75 P.3d 219 (Ct. App. 2003). "Jury instructions that omit an element of the crime lighten the prosecution's burden of proof and are impermissible." *Id.* See also *McKay v. State*

148 Idaho 567, 225 P.3d 700 (2010). Jury instructions that fail to require the state to prove every element of the offense violate due process and, thus, rise to the level of fundamental error. *State v. Hansen*, 148 Idaho 442, 224 P.3d 509 (Ct. App. 2009) (citing *Middleton v. McNeil*, 541 U.S. 433, 437 (2004); *State v. Anderson*, 144 Idaho 743, 749, 170 P.3d 886 (2997)). The jury instruction must "fairly and accurately reflect the applicable law." *State v. Payne*, 134 Idaho 423, 425, 3 P.3d 1251 (2000). If the instructions misled the jury or prejudiced the defendant, the reviewing court must reverse the judgment or conviction. *Halbesleben*, 139 Idaho at 169.

"A trial judge should remain vigilant in observing the duty set forth in Idaho Code § 19-2132: 'In charging the jury, the court must state to them all matters of law necessary for their information.'" SUPREME COURT OF THE STATE OF IDAHO, IDAHO CRIMINAL JURY INSTRUCTIONS, INTRODUCTION AND GENERAL DIRECTIONS FOR USE, *available at* http://www.isc.idaho.gov/idaho_courts_e.htm. But see *State v. Adamcik*, No. 34639, 2011 WL 5923063, *24 (Idaho, Nov. 29, 2011) (noting, "Where the language of the indictment or information goes beyond alleging elements of the crime, it is mere surplusage that need not be proved. However, the inclusion of surplusage must not be allowed to prejudice a defendant in the context of his case" (internal citation omitted)); *State v. Hoffman*, 37 Idaho 897, 901, 55 P.3d 890 (Ct. App. 2002) ("a variance between a charging instrument and a jury instruction necessitates reversal only when it deprives the defendant of his right to fair notice or leaves him open to the risk of double jeopardy." (internal citation omitted)); *State v. Draper*, 151 Idaho 576, 261 P.3d 853, 866 (2011) (finding trial court did not err for not instructing jury on definitions of willful and deliberate, because the defendant was attempting to insert legal definitions where the common definition [was] the appropriate one).

In this case, the Information charges that Mr. Herrera "...did willfully, unlawfully, deliberately, and with malice aforethought, but without premeditation, kill and murder Mrs. Larsen..." Accordingly, the terms "willfully, unlawfully, deliberately, and with malice aforethought," are alleged as elements of the crime in the Information (*not mere surplusage*), which the state is obligated to prove

GIVEN _____
 REFUSED _____
 ACCEPTED _____
 MODIFIED _____
 COVERED _____
 JUDGE _____

DEFENDANT'S REQUESTED
INSTRUCTION NO: 26

Before you may find Mr. Herrera guilty of Murder in the Second Degree as charged in Count I, the State must prove to you that Mr. Herrera willfully, unlawfully and deliberately caused the death of Stephanie Comack.

Deliberately, as charged by the State in Count I of the Information is defined as:

an intent to kill executed in a cool state of blood, not in sudden passion engendered by lawful or some just cause or provocation;¹
done with reflection;²
a dispassionate weighing process and consideration of consequences before acting.³

Unlawfully, as charged by the State in Count I of the Information, is defined as acting without legal justification or excuse.

Willfully, as charged by the State in Count I of the Information, means a purpose or willingness to commit the act charged in the Information.⁴

Comment

The Idaho Supreme Court has recognized that jury instructions should mirror the allegations in the charging document:

In particular, the instructions should be tailored to fit the allegations in the

¹ See *State v. Dong Sing*, 35 Idaho 616, 208 P. 860 (1922); *State v. Koho*, 91 Idaho 450, 423, P.2d 1004 (1967).

² See *Sheahan v. Smith*, No. 1:08-CV-00444-EJL, 2011 WL 1219681, *9 (D. Idaho, March 28, 2011) (slip copy).

³ See *Polk v. Sandoval*, 503 F.3d 903, 907 (9th Cir. 2007); *Elliot v. Williams*, No. 2:08-cv-00829-GMN, 2011 WL 4436648 (D. Nev., Sep. 23, 2011) (citing *Chambers v. McDaniel*, 549 F.3d 1191, 1201 (9th Cir. 2008)).

⁴ See ICJI 340 comment. See, e.g., *State v. Aragon*, 107 Idaho 358, 690 P.2d 293 (1984) (willfully means that there was manifested a clear intent to take life, defined in context of first degree murder, as contrasted with definition of malice). But see *State v. Draper*, 151 Idaho 576, 261 P.3d 853 (2011) (discussing *Aragon*: "There, the distinction was between malice and willfulness and, unlike malice, which has a specific legal definition, the common definition of willfulness is applicable.").

complaint, information or indictment. Failure to do so may cause a fatal variance between the instructions and the charging document, which could deprive the defendant of the right to fair notice of the charges or leave the defendant open to the risk of double jeopardy. *See, State v. Tiffany*, 139 Idaho 909, 918-19, 88 P.3d 737-38 (2004); *State v. Windsor*, 110 Idaho 410, 417-18, 716 P.2d 1182, 1189-90 (1985). A statute will often provide that a particular crime can be committed in different ways. The jury should be instructed only on the particular manner of committing the crime that is alleged in the charging document. In addition, the instructions should not allow the jury to convict a defendant on the basis of acts or injuries other than those alleged in the charging document.

SUPREME COURT OF THE STATE OF IDAHO, IDAHO CRIMINAL JURY INSTRUCTIONS, INTRODUCTION AND GENERAL DIRECTIONS FOR USE, available at http://www.isc.idaho.gov/idaho_courts_e.htm.

Jury instructions must "include every element of the charged offense that the State is obligated to prove." *State v. Halbesleben*, 139 Idaho 165, 169, 75 P.3d 219 (Ct. App. 2003). "Jury instructions that omit an element of the crime lighten the prosecution's burden of proof and are impermissible." *Id.* *See also McKay v. State*

148 Idaho 567, 225 P.3d 700 (2010). Jury instructions that fail to require the state to prove every element of the offense violate due process and, thus, rise to the level of fundamental error. *State v. Hansen*, 148 Idaho 442, 224 P.3d 509 (Ct. App. 2009) (citing *Middleton v. McNeil*, 541 U.S. 433, 437 (2004); *State v. Anderson*, 144 Idaho 743, 749, 170 P.3d 886 (2997)). The jury instruction must "fairly and accurately reflect the applicable law." *State v. Payne*, 134 Idaho 423, 425, 3 P.3d 1251 (2000). If the instructions misled the jury or prejudiced the defendant, the reviewing court must reverse the judgment or conviction. *Halbesleben*, 139 Idaho at 169.

"A trial judge should remain vigilant in observing the duty set forth in Idaho Code § 19-2132: 'In charging the jury, the court must state to them all matters of law necessary for their information.'" SUPREME COURT OF THE STATE OF IDAHO, IDAHO CRIMINAL JURY INSTRUCTIONS, INTRODUCTION AND GENERAL DIRECTIONS FOR USE, available at http://www.isc.idaho.gov/idaho_courts_e.htm. *But see State v. Adamcik*, No. 34639, 2011 WL 5923063, *24 (Idaho, Nov. 29, 2011) (noting, "Where the language of the indictment or information goes beyond alleging elements of the crime, it is mere surplusage that need not be proved. However, the inclusion of surplusage must not be allowed to prejudice a defendant in the context of his case" (internal citation omitted)); *State v. Hoffman*, 37 Idaho 897, 901, 55 P.3d 890 (Ct. App. 2002) ("a variance between a charging instrument and a jury instruction necessitates reversal only when it deprives the defendant of his right to fair notice or leaves him open to the risk of double jeopardy," (internal citation omitted)); *State v. Draper*, 151 Idaho 576, 261 P.3d 853, 866 (2011) (finding trial court did not err for not instructing jury on definitions of willful and deliberate, because the defendant was attempting to insert legal definitions where the common definition [was] the appropriate one).

In this case, the Information charges that Mr. Herrera "...did willfully, unlawfully, deliberately, and with malice aforethought, but without premeditation, kill and murder

Mrs. Larsen..." Accordingly, the terms "willfully, unlawfully, deliberately, and with malice aforethought," are alleged as elements of the crime in the Information (and *not mere surplusage*) which the state is obligated to prove. As such, Mr. Ellington is entitled to give instructions to the jury regarding the definitions of "willfully," "unlawfully," and "deliberately," in Count I. *See, e.g., State v. Lilly*, which discussed *State v. Young*:

...[T]he Idaho Supreme Court addressed the use of the I.C. § 18-101(1) general definition of "willfully" in the context of the charge of felony injury to a child, I.C. § 18-1501(1). The *Young* Court reached the same conclusion as that reached by this Court in *Sohm*; *that the district court erred in giving the general definition of willfully because it directly conflicted with the use of the term in the substantive statute.*

State v. Lilly, 142 Idaho 70, 73, 122 P.3d 1170 (Ct. App. 2005) (citing *State v. Young*, 138 Idaho 370, 64 P.3d 296 (2002) (emphasis added)). This suggests that terms used in criminal statutes are not always identical to the general definitions used in a dictionary; demonstrating that the court has the authority to give instructions about the definitions of terms used in the context in which the term is used in the substantive statute.

GIVEN _____
REFUSED _____
ACCEPTED _____
MODIFIED _____
COVERED _____
JUDGE _____

DEFENDANT'S PROPOSED VERDICT FORM

With respect to the charge of second degree murder, we, the Jury, unanimously
find the Defendant Joseph Herrera:

_____ Not Guilty

_____ Guilty

With respect to the included charge of voluntary manslaughter, we, the Jury,
unanimously find the Defendant Joseph Herrera:

_____ Not Guilty

_____ Guilty

With respect to the included charge of involuntary manslaughter, we, the
Jury, unanimously find the Defendant Joseph Herrera:

_____ Not Guilty

_____ Guilty

Dated this _____ day of _____, 2013.

Presiding Juror

ICJI 220 (MODIFIED)

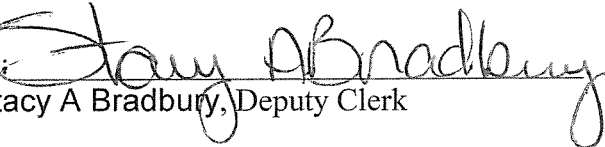
IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE
OF IDAHO, IN AND FOR THE COUNTY OF BENEWAH

STATE OF IDAHO)
Plaintiff / Respondent) DISTRICT COURT NO: CR11-2053
Vs.)
) SUPREME COURT CASE # 41494
) **CERTIFICATE OF RECORD**
JOSEPH D. HERRERA)
Defendant / Appellant)

I, DEANNA BRAMBLETT, Clerk of the District Court of the First Judicial District of the State of Idaho, in and for the County of Benewah, do hereby certify that the above and foregoing record in the above-entitled cause was compiled under my direction as, and is a true and correct record of the pleadings and documents that are automatically required under Rule 28 of the Idaho Appellate Rules, as well as those requested by Counsels.

I further certify that the Notice of Appeal was filed in the District Court on October 1st, 2013.

DEANNA BRAMBLETT
CLERK OF THE DISTRICT COURT

By: 
Stacy A Bradbury, Deputy Clerk

CERTIFICATE OF RECORD

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF IDAHO,
IN AND FOR THE COUNTY OF COUNTY OF BENEWAH

STATE OF IDAHO)
Plaintiff /Respondent) DISTRICT COURT NO: CR-11-2053
VS)
) SUPREME COURT CASE # 41494
JOSEPH DUANE HERRERA)
Defendant /Appellant) **CERTIFICATE OF EXHIBITS**
)

I, DEANNA BRAMBLETT, Clerk of the District Court of the First Judicial District of the
State of Idaho, in and for the County of Benewah, do hereby certify that the following is a list of
exhibits that have been lodged with the Supreme Court.

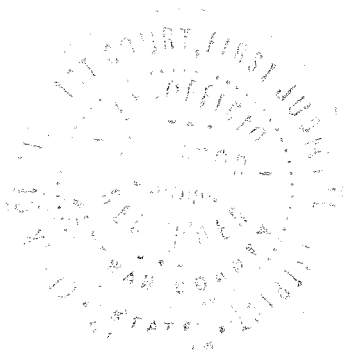
<u>Exhibit Number:</u>	<u>Description:</u>	<u>Assigned to:</u>
1.	Transcript of Motions held 07/13/12	

Confidential Exhibits:

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the Seal of Said Court
on the 3 Day of March 2014.

DEANNA BRAMBLETT
CLERK OF THE DISTRICT COURT

By: Stacy A. Bradbury
Stacy A. Bradbury, Deputy Clerk



CERTIFICATE OF EXHIBITS

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF IDAHO,
IN AND FOR THE COUNTY OF COUNTY BENEWAH

STATE OF IDAHO,)
Plaintiff /Respondent) DISTRICT COURT NO: CR11-2053
VS.)
) SUPREME COURT CASE # 41494
JOSEPH DUANE HERRERA)
Defendant /Appellant) CERTIFICATE OF SERVICE
)

I, DEANNA BRAMBLETT, Deputy Clerk of the District Court of the First Judicial District of the State of Idaho, in and for the County of Benewah, do hereby certify that I have personally served or mailed, by X United States mail, hand delivery, one copy of the Clerk's Record and Court Reporter's Transcript to the following Attorney's in this cause as follows:

Sara B. Thomas
State Appellate Public Defender
Attorney for Defendant
3050 N. Lake Harbor Lane Suite 100
Boise, ID 83703

Lawrence G Wasden
Idaho Attorney General
Statehouse, Room 210
Boise, ID 83720

IN WITNESS WHEREOF, I have hereunto set my hand the affixed seal of the said Court
this 3 day of March , 2014

DEANNA BRAMBLETT, Clerk of the Court

By Stacy A Bradbury
Stacy A Bradbury, Deputy Clerk

